Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,

*Petitioners*,

v.

STATE OF OREGON, DEPARTMENT OF TRANSPORTATION, *ET AL.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Oregon**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a flat fee imposed by the State of Oregon upon commercial vehicles conducting interstate operations violates the Commerce Clause of the United States Constitution.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Supreme Court of Oregon were petitioners American Trucking Associations, Inc.; CRST, Inc.; USF Reddaway, Inc.; Kenneth E. Mansigh Trucking, Inc.; Veneer Chip Transport, Inc.; and respondents State of Oregon, Department of Transportation; Grace Crunican, in her capacity as Director of the Oregon Department of Transportation; and AAA Oregon/Idaho.

Petitioner American Trucking Associations, Inc., has no parent corporation and there is no publicly held company owning 10% or more of its stock. Petitioner CRST, Inc. has changed its name to CRST Van Expedited, Inc. and is a wholly owned subsidiary of CRST International, Inc, which is not publicly held. Petitioner Kenneth E. Mansigh Trucking, Inc., has no parent corporation and there is no publicly held company owning 10% or more of its stock. Petitioner Veneer Chip Transport, Inc., has no parent corporation and there is no publicly held company owning 10% or more of its stock. Petitioner USF Reddaway, Inc. is a wholly-owned subsidiary of YRC Regional Transportation, Inc., which in turn is a wholly-owned subsidiary of YRC Worldwide Inc. No publicly held corporation owns more than 10% of YRC Wordwide Inc.'s stock.

# TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... 1

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ..... ii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT ..... 2

REASONS FOR GRANTING THE PETITION ..... 10

A. Flat Taxes On Motor Carriers Traveling Interstate Are Inherently Discriminatory ..... 10

1. The structure of an unapportioned flat tax necessarily places interstate taxpayers at a disadvantage ..... 11

2. The decision below conflicts with the holdings of federal courts of appeals and state courts of last resort that empirical evidence is not necessary to demonstrate the discriminatory nature of a flat highway tax ..... 14

3. The Oregon Supreme Court's reliance on *Michigan Public Service Commission* misunderstands this Court's holding and confuses the law ..... 17

**TABLE OF CONTENTS**
(continued)

**Page**

4. The Oregon Supreme Court's dismissal of the record evidence of discriminatory effect stated an erroneous legal standard and placed a nearly insuperable burden on taxpayers bringing challenges under the Commerce Clause ..... 20

B. The Decision Below Misunderstood The Significance And Application Of The Commerce Clause Internal Consistency Test ..... 22

1. Unapportioned flat taxes like Oregon's lack internal consistency ..... 22

2. The internal consistency test can be used to determine whether a state tax imposes discriminatory, structural burdens on interstate commerce ..... 24

3. The holding below that a state highway tax cannot violate the internal consistency test because it does not pose the threat of duplicative taxation conflicts with the decisions of federal courts of appeals and other state courts of last resort ..... 26

C. The Question Presented Here Is An Important And Recurring One ..... 27

CONCLUSION ..... 30

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*American Trucking Ass'ns, Inc.* v. *Goldstein*, 541 A.2d 955 (Md. 1988) ..... 16, 28

*American Trucking Ass'ns, Inc.* v. *Michigan Public Serv. Comm'n*, 125 S. Ct. 2419 (2005) ..... 9, 17, 18, 19

*American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987) ..... *passim*

*American Trucking Ass'ns, Inc.* v. *Sec'y of Administration*, 613 N.E.2d 95 (Mass. 1993)..... 16, 26, 29

*American Trucking Ass'ns, Inc.* v. *Sec'y of State*, 595 A.2d 1014 (Me. 1991) ..... 26, 29

*American Trucking Ass'ns, Inc.* v. *State*, 556 N.W.2d 761 (Wis. Ct. App. 1996)..... 17, 27, 28

*American Trucking Ass'ns, Inc.* v. *State*, 852 A.2d 142 (N.J. 2004) ..... 16, 25, 26

*American Trucking Assn's, Inc.* v. *Conway*, 566 A.2d 1335 (Vt. 1989) ..... 28

*Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984) ..... 25

*Associated Industries of Missouri* v. *Lohman*, 511 U.S. 641 (1994) ..... 13

*Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) ..... 29

*Best & Co.* v. *Maxwell*, 311 U.S. 454 (1940) ..... 30

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

*Black Beauty Trucking, Inc.* v. *Indiana Dept. of State Rev.*, 527 N.E.2d 1163 (Ind. Tax 1988) ..... 16

*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997) ..... 29

*Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950) ..... 12

*Commonwealth* v. *American Trucking Ass'ns, Inc.*, 746 S.W.2d 65 (Ky. 1988) ..... 16, 26

*Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 74 (1977) ..... 9

*Government Suppliers Consolidating Serv., Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992) ..... 16, 26

*Maryland* v. *Lousiana*, 451 U.S. 725 (1981) ..... 21

*Nippert* v. *City of Richmond*, 327 U.S. 416 (1946) ..... 11, 12, 13

*Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175 (1995) ..... 23, 24

*Trailer Marine Transport Corp.* v. *Vazquez*, 977 F.2d 1 (1st Cir. 1992) ..... 14, 15

*Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Rev.*, 483 U.S. 232 (1987) ..... 24

*United States* v. *Sperry Corp.*, 493 U.S. 52 (1989) ..... 25

*West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994) ..... 30

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

**Statutes and Regulations**

28 U.S.C. § 1257 ..... 1
Cal. Veh. Code §2502(c) ..... 27
Col. Rev. Stat. Ann. § 42-20-202(1) ..... 27
Conn. Gen. Stat. Ann. § 22a-454(a) ..... 27
Code Del. Reg. 10-400-007 ..... 27
Ga. Code § 46-11-4 (i) ..... 27
Iowa Code Ann. § 455B.424(5) ..... 27
Kan. Admin. Regs. 28-31-10(f) ..... 27
Md. Code Ann. Envir. § 7-252(a)(2)(ii) ..... 27
Mich. C.L.A. § 29.473(3) ..... 28
Minn. Stat. Ann. § 221.0355(4) ..... 28
Nev. Admin. Code § 459.9805(1) ..... 28
N.C. Gen. Stat. § 130A-294.1(j) ..... 28
N.Y. ECL § 72-0502 ..... 28
Ohio Rev. Code § 4905.80(C)(1) ..... 28
Oregon Revised Statutes:
ORS § 825.474 ..... 1, 2, 3
ORS § 825.480 ..... 1, 22
ORS § 825.480(1) ..... 3
ORS § 825.480(2) ..... 4
ORS § 825.480(4) ..... 3
ORS § 825.480(5) ..... 3

## TABLE OF AUTHORITIES
(continued)

**Page(s)**

Tex. Nat. Res. Code § 113.131 (d)(1) ..... 28
Tex. Nat. Res. Code § 116.072 (c)(1) ..... 28
Wy. Stat. § 37-14-103 ..... 28

## PETITION FOR A WRIT OF CERTIORARI

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### OPINIONS BELOW

The opinion of the Supreme Court of Oregon (App., *infra*, 1a-22a) is reported at 124 P.3d 1210. The opinion of the Oregon Court of Appeals (App., *infra*, 23a-39a) is reported at 90 P.3d 15. The opinion of the Oregon Circuit Court (App., *infra*, 40a-78a) is unreported.

### JURISDICTION

The judgment of the Supreme Court of Oregon was entered on December 15, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides in relevant part:

> The Congress Shall have the Power * * * To Regulate Commerce * * * among the several States.

Section 825.480 of the Oregon Revised Statutes provides in relevant part:

> (1)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in operating motor vehicles in the transportation of logs, poles, peeler cores or piling may pay annual fees for such operation computed at the rate of six dollars and ten cents for each 100 pounds of declared combined weight.
>
> * * *
>
> (4)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in the operation of motor vehicles equipped with dump bodies and used in the transportation of sand,

gravel, rock, dirt, debris, cinders, asphaltic concrete mix, metallic ores and concentrates or raw nonmetallic products, whether crushed or otherwise, moving from mines, pits or quarries may pay annual fees for such operation computed at the rate of six dollars and five cents for each 100 pounds of declared combined weight.

* * *

(5)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in operating motor vehicles in the transportation of wood chips, sawdust, barkdust, hog fuel or shavings may pay annual fees for such operation computed at the rate of twenty-four dollars and sixty-two cents for each 100 pounds of declared combined weight.

## STATEMENT

In *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266 (1987), this Court held that flat state taxes on motor carriers traveling interstate violate the Commerce Clause of the U.S. Constitution. Such taxes, the Court explained, lack "internal consistency" because, if imposed by every state, they would place interstate commerce at a significant structural disadvantage vis-à-vis carriers confining their operations to a single state. At the same time, the Court added, flat taxes inevitably discriminate in their practical effect against motor carriers that operate interstate because they impose a higher effective per-mile rate on interstate trucks than on vehicles operating only in the taxing state. The Court accordingly concluded that such a flat levy "is unquestionably discriminatory and thus offends the Commerce Clause." *Id.* at 296.

In this case, however, the Oregon Supreme Court upheld a flat tax on motor carriers traveling interstate that, in its pernicious effects, is largely identical to the one struck down in *Scheiner*. In doing so, the Oregon court held (1) that the internal consistency test cannot invalidate taxes on the use of a state's highways and (2) that taxpayers invoking the Com-

merce Clause may not rely on the inherently discriminatory structure of a tax and instead are obligated to adduce empirical evidence that the levy affects their interstate operations in a discriminatory way. That decision plainly departs from this Court's holdings, squarely conflicts with decisions of federal courts of appeals and other state courts of last resort, permits the imposition of discriminatory burdens on interstate commerce, and sows considerable confusion in an already complex area of the law. Further review therefore is warranted.

1. The State of Oregon imposes a tax on heavy trucks that use its highway system, applying the revenue to pay for "constructing and maintaining highways." App., *infra*, 36a. See *id.* at 11a ("proceeds dedicated to Oregon highways"). Most trucks pay a "weight-mile tax," under which a "trucking carrier pays a rate for each mile that its trucks operate on the state's public highways." *Id.* at 25a. See ORS § 825.474. But Oregon also offers carriers of certain commodities – logs, sand and gravel, and wood chips – the option of paying a flat tax in lieu of the weight-mile tax. ORS § 825.480(1), (4), and (5).

For each commodity whose carriers are eligible to make use of the flat-tax option, the state legislature set the annual tax at an amount that it ostensibly "believed to be identical to what a truck of the same weight carrying that commodity would pay in weight-mile tax if it operated as many miles per year as an average truck that carried that commodity" – basing this amount "on the assumption that the truck in question operates *entirely* in Oregon." App., *infra*, 25a (emphasis added). Because the flat tax does not vary according to miles actually traveled, for each commodity there is a "break-even" number of miles; if a truck travels beyond that break-even point in Oregon, the carrier will pay a lower tax under the flat-tax option than it would have paid under the weight-mile alternative. Carriers that pay the flat tax and exceed the break-even point thus obtain what the Oregon Department of

Transportation has characterized as "free miles" and enjoy corresponding "tax savings." Trial Ex. 23. The obvious effect of the flat tax therefore is to reduce the effective per-mile tax rate on trucks whose mileage in Oregon exceeds the break-even point. App., *infra*, 26a-27a.[1]

Although use of the flat-tax option purportedly is open to all carriers of the favored commodities, the comparatively high break-even mileage set by the Oregon Legislature (calculated by looking to mileage traveled by the average truck that operates *only* in Oregon) means that it almost *never* will be feasible for carriers that operate their trucks in interstate commerce to elect the flat tax. That is especially so because a carrier may choose between the flat-tax and weight-mile options only once a year, and a carrier that elects the flat-tax approach must do so for *all* the trucks in its fleet that carry the specified commodity in Oregon. ORS 825.480(2).

This reality is confirmed by empirical evidence. According to the best data available for the most recent tax period prior to trial, only approximately 0.22 per cent of all out-of-state based carriers whose trucks used Oregon highways paid their highway tax under the flat-tax option, while approximately 11 per cent of all Oregon-based carriers did – making Oregon carriers *fifty* times more likely than their out-of-state competitors to choose the flat tax. ER 8.[2] Similarly, out-of-

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[1] In fact, the Oregon Department of Transportation has calculated and published break-even numbers for flat-tax commodity carriers. See ER 16, Ex. 22.

[2] Only carriers transporting the favored commodities are eligible to pay the flat fee; that is why "most carriers operating in Oregon, both those that operate primarily interstate and those that operate primarily intrastate, pay the weight-mile tax." App., *infra*, 32a. But among similarly situated carriers eligible to opt for the flat tax, the decision to do so is made overwhelmingly by intrastate carriers.

state based carriers made up only 3.5 per cent (38 out of 1094) of the carriers electing to pay the flat tax, paid only two per cent ($187,060 out of $9,266,743) of taxes collected under the flat tax, operated only about two per cent (2,185,101 out of 105,021,120) of the total miles reported by trucks paying the flat tax, and operated only about three per cent (129 out of 4401) of the total trucks whose highway tax was paid under the flat-tax option. ER 9-12, 28.[3]

Data also confirm the obvious in a related way: flat-tax taxpayers that travel a high volume of miles in Oregon obtain substantial savings by doing so, underpaying in comparison with what they would have paid – and what their competitors *did* pay – under the weight-mile system. According to the best data available for the most recent tax year at the time of trial, sand and gravel carriers that elected the flat-tax option in the aggregate paid $276,535.86 less than they would have paid under the weight-mile option, while flat-tax log carriers paid $1,164,585.86 less. App., *infra*, 6a, 26a.[4]

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[3] Even these statistics overstate the extent to which out-of-state carriers benefit from the flat tax. Out-of-state based carriers paying the flat tax are very different from other out-of-state carriers that use Oregon's highways. In 2000, almost sixty per cent of the trucks operated in Oregon by out-of-state carriers paying the flat tax (75 out of 129) were base-registered *in Oregon* (ER 12, Stip. ¶ 6 (cc)); in contrast, out-of-state based carriers paying the Oregon weight-mile tax based virtually all of their 245,982 vehicles outside the State. Many out-of-state based carriers electing to pay the flat tax thus essentially assume the characteristics of Oregon companies.

[4] Data from prior years showed a similar advantage for flat-tax carriers of sand and gravel and logs. See ER 25. In contrast, the flat tax for trucks carrying wood chips was set at a level that closely approximated the aggregate amount paid by trucks subject to the weight-mile tax; in the most recent tax year for which data were available at the time of trial, flat-tax wood chip carriers as a

Thus, as the court of appeals explained, "[t]he structure of the taxing system makes it probable that carriers that choose the flat fee options will, as a group, pay less than if they paid the weight-mile tax," as "[o]nly a carrier that expects to save money will elect to choose to pay a flat fee." App., *infra*, 26a. And "the primary benefit that the [flat-tax] options provide is to reduce the total tax bill of a carrier whose trucks operate more miles than the presumed average that the legislature used to calculate the amount of the flat fee." *Ibid.* These savings have substantial competitive implications for the (largely in-state) companies that benefit from the flat tax. "For sand and gravel carriers, the underpayments are equivalent to 1.34 cents per mile, while for log carriers they are equivalent to 1.9 cents per mile. For purposes of comparison, the average profit margin in the trucking industry is 3 cents per mile." *Ibid.*

2. Petitioners, interstate truckers and their trade association, brought this action in Oregon state court to challenge the constitutionality of the flat tax under the Commerce Clause. Invoking the principles enunciated in *Scheiner* and related decisions, petitioners contended that the flat tax lacks internal consistency: if all states employed a similar highway tax regime, interstate truckers would be placed at a structural disadvantage because it always would be cheaper for high-mileage vehicles to confine their operation to a single state than to travel between states. Petitioners also maintained that the tax necessarily discriminates against interstate commerce in its practical effect because high-mileage interstate carriers inevitably will pay Oregon's highway tax at a higher effective per-mile rate than do identical carriers whose vehicles operate only in Oregon. The trial court recognized that flat-tax sand and gravel and log carriers do pay their highway tax

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group paid $27,315.75 more than they would have paid under the weight-mile tax. App., *infra*, 26a.

at a lower effective per-mile rate than carriers electing the weight-mile tax, and also acknowledged that most flat-tax carriers are based in Oregon (App., *infra*, 67a-68a), but nevertheless upheld the flat tax. *Id.* at 40a-78a.

The Oregon Court of Appeals reversed. App., *infra*, 23a-39a. Relying on *Scheiner* and this Court's other Commerce Clause precedents, the court of appeals began by noting that "'[i]nternal consistency' appears to be the primary test for determining whether a tax discriminates against interstate commerce in effect. For determining both fair apportionment and discrimination in effect, the issue is whether the tax, if universally applied, would impermissibly interfere with free trade." *Id.* at 30a. The court also observed that, although the flat tax is optional and applies to only a limited number of commodities, "those facts may limit the discriminatory effect of the flat fees, [but] they do not necessarily make them constitutional. It remains possible that the very act of choosing the flat fee will encourage a carrier to focus on intrastate rather than interstate commerce." *Id.* at 32a. And reviewing this Court's decisions, the court of appeals concluded that, "[i]n deciding this kind of issue, the Supreme Court's case law does not rely on the specific evidence in a specific case as the foundation for its conclusions concerning a particular tax. Rather, it focuses on the structure of the tax at issue[.]" *Ibid.*

Turning to the particulars of Oregon's flat tax, the court found that the relevant tax structure

> can readily be perceived by describing [a] hypothetical situation. Here, the focus is on carriers whose trucks travel more miles in Oregon than the amount that the legislature presumed. As one example, assume that the weight-mile tax for a particular truck is ten cents per mile, that the legislature presumes that the average truck carrying the commodity involved will travel 40,000 miles

per year in Oregon, and that the legislature has therefore set an alternative flat fee at $4,000 per year. Carrier A has trucks that actually travel 50,000 miles entirely in Oregon; it elects to pay the flat fee and therefore pays $4,000 per truck, or an effective rate of 8 cents rather than 10 cents per mile. Carrier B has trucks that also operate 50,000 miles, but they operate half the time in Oregon and half the time in other states with identical tax systems. Carrier B would lose money by electing to pay the flat fee in any state that has such a taxing scheme because the flat fee is calculated on an amount of mileage greater than its trucks will travel in any one state. Thus, economic necessity requires [C]arrier B to elect to be taxed on the basis of its mileage, and its total fees will be $5,000 per truck, or an effective rate of 10 cents per mile. Such a taxing scheme favors intrastate carriers over interstate carriers. Any other hypothetical situation, using any other figures for an unapportioned flat fee option, will show a similar malapportionment and discriminatory effect as to interstate carriers that exceed the presumed average miles.

In this hypothetical situation, the flat fee option will both exert pressure on the interstate carrier to change its operations to focus on interstate business and will discriminate against the interstate carrier if it does not do so. Only by focusing on intrastate business can the carrier pay the lower tax rate that similarly situated intrastate carriers are able to pay. The flat fee options, thus, discriminate between interstate and intrastate carriers whose businesses differ only because of their relationship to state boundaries, and the discrimination operates to the detriment of the interstate carrier.

App., *infra*, 32a-34a. The court of appeals accordingly held the flat tax options unconstitutional. *Id.* at 39a.

The Oregon Supreme Court reversed. App., *infra*, 1a-22a.[5] First addressing the internal consistency test, the court perceived no constitutional problem with the Oregon flat tax because "[t]he flat-fee option is aimed at operations that take place primarily in Oregon. If viewed as a tax, it is one imposed upon an activity that takes place exclusively within this state's borders." *Id.* at 18a. "As a result," the court concluded, "if every state replicated Oregon's flat-fee tax option under the same terms, we cannot hypothesize a scenario where the interstate commerce in logs, sand and gravel, or wood chips would be subject to multiple taxation or could be viewed as one state's attempt to take more than its fair share of taxes from transactions involving those commodities." *Ibid.*

The Oregon Supreme Court next rejected the proposition that petitioners could rely on the structure of the flat tax to establish its inherently discriminatory effect. Instead, the court below opined that this Court "has never viewed hypothetical possibilities, standing alone, as sufficient to constitute unconstitutional discrimination for Commerce Clause purposes." App., *infra*, 19a. The court found support for that position in *American Trucking Ass'ns, Inc.* v. *Michigan Public Service Commission*, 125 S. Ct. 2419 (2005), which it read to "make[] clear that plaintiffs cannot rely on hypothetical assertions to establish the existence of discriminatory economic effects; plaintiffs must demonstrate actual discrimination." App., *infra*, 22a.

In the court's view, no such showing was made in this case. The court recognized "the aggregate savings realized

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[5] The court began by concluding that the Oregon highway tax should not be regarded as a "user fee" and, instead, should be evaluated as a tax subject to the four-part Commerce Clause test set out in *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977). App., *infra*, 11a-16a.

under the flat fee." App., *infra*, 20a-21a. But it did not find that evidence probative because "plaintiffs do not break those figures down between in-state and out-of-state trucking operations, or otherwise show how the aggregate savings serve to set the two groups apart." *Id.* at 21a. The court therefore concluded that "there is nothing to show that the flat-fee option before us effectively has created an unconstitutionally protected trade area that prefers local commerce over interstate commerce." *Ibid.*

## REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of great practical importance: whether state taxes that structurally disadvantage interstate commerce are invalid under the Commerce Clause. It is, of course, fundamental that state tax regimes may not discriminate in favor of domestic and against interstate businesses. The holding below, which approved just such a discriminatory tax, accordingly should not stand. That decision cannot be reconciled with *Scheiner* and other of this Court's precedents; contributes to a conflict in the lower courts about the meaning and application of the controlling Commerce Clause principles; and provides a model for state taxing authorities that wish to provide a commercial advantage to in-state businesses. Because the governing law is complex – as is suggested by the unanimous, and flatly inconsistent, decisions of the Oregon Court of Appeals and Oregon Supreme Court – and because the legal question presented is one of considerable significance to jurisdictions across the Nation, review of the decision below is warranted.

### A. Flat Taxes On Motor Carriers Traveling Interstate Are Inherently Discriminatory

At the outset, the court below went astray in holding that Oregon's flat tax does not discriminate against interstate commerce – and in its related ruling that empirical evidence of discriminatory impact is necessary before a tax that im-

poses structural burdens on interstate commerce will be invalidated. That conclusion is inconsistent with this Court's precedents and conflicts with the holdings of federal courts of appeals and other state courts of last resort.

### *1. The structure of an unapportioned flat tax necessarily places interstate taxpayers at a disadvantage*

While the Oregon flat tax nominally applies in the same amount to inter- and intrastate businesses, "the Commerce Clause has a deeper meaning that may be implicated even though state provisions * * * do not allocate tax burdens between insiders and outsiders in a manner that is facially discriminatory." *Scheiner*, 483 U.S. at 281. Sixty years ago, in *Nippert* v. *City of Richmond*, 327 U.S. 416 (1946), the Court described why this is so. Striking down a flat municipal license fee imposed on interstate solicitors (so-called "drummers") doing business in the city, the Court explained:

> [T]he tax * * * cannot be taken to apply generally to local distributors in the same manner and with like effects as in application to out-of-state distributors. The very difference in locations of their business headquarters, if any, and of their activities makes this impossible. This, of course, is but another way of saying that the very difference between interstate and local trade, taken in conjunction with the inherent character of the tax, makes equality of application between those two classes of commerce, generally speaking, impossible.

*Id.* at 432.

In *Scheiner*, the Court applied this conclusion to invalidate flat Pennsylvania taxes on interstate motor carriers whose vehicles passed through the taxing jurisdiction. The Court noted that such flat levies necessarily disadvantage interstate businesses: "[T]he very nature of the market that in-

terstate operators serve prevents them from making full use of the privilege * * * for which they have paid the State" a flat fee. 483 U.S. at 284 n.16. Thus,

> "the intrastate vehicle can and will exercise the privilege whenever it is in operation, while the interstate vehicle must necessarily forego [*sic*] the privilege some of the time simply because of its interstate character, *i.e.*, because it operates in other States as well. In the general average of instances, the privilege is not as valuable to the interstate as to the intrastate carrier."

*Id.* at 291 (quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 557 (1950) (Frankfurter, J., dissenting)).

Against that background, the discriminatory impact of a flat levy like Oregon's is undeniable. A trucking company that confines its operations to Oregon and pays the flat tax travels for free once it exceeds the break-even mileage; as a practical matter, an otherwise identical interstate trucker that travels the same number of total miles will not have that option available because it will not reach the break-even point in any one state. The local company therefore will pay the tax at a lower effective rate than does its interstate competitor. And "imposition of [a] flat tax[] for a privilege that is several times more valuable to a local business than to its out-of-state competitors is unquestionably discriminatory and thus offends the Commerce Clause. The great constitutional purpose of the Fathers cannot be defeated by using an apparently neutral 'guise of taxation which produces the excluding and discriminatory effect.'" *Scheiner*, 483 U.S. at 296 (quoting *Nippert*, 327 U.S. at 426).

Given this reality, when the structure of a flat tax necessarily discriminates against interstate businesses "'[i]n the general average of instances,'" there is no need for particularized proof of the per-mile or per-transaction disparity in the effective rates imposed on inter- and intrastate taxpayers. In

*Nippert*, for example, no such evidence was required. And although the Court pointed in passing to empirical evidence in *Scheiner* (see 483 U.S. at 286), that evidence was not essential to the Court's holding: the Court declared that "[t]he *method* of assessing the [flat] taxes in [*Scheiner*] on Pennsylvania-based vehicles and on other vehicles established that the State is not treating the two types of vehicle with an even hand." *Id.* at 282 (emphasis added).[6]

That the Oregon flat tax is optional does not vitiate its discriminatory nature. High-mileage trucks – those that exceed the break-even point and therefore find it worthwhile to elect the flat tax – pay Oregon's highway levy at a lower effective rate than those that pay the weight-mile tax. And, as we have explained, the flat fee option is not available as a practical matter to trucks that do substantial business across state lines. Moreover, even interstate trucks that *do* elect to pay the flat tax inevitably are placed at a competitive disadvantage. Because such trucks travel some of their mileage in

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[6] In reaching its conclusion that structural impediments to interstate commerce are not enough to establish discrimination, the court below relied on *Associated Industries of Missouri* v. *Lohman*, 511 U.S. 641 (1994). See App., *infra*, 19a-20a. But *Associated Industries* stands for no such proposition. To the contrary, the Court there reiterated that "as a general matter we have *rejected* reliance on any calculus that requires a quantification of discrimination as a preliminary step to determining whether the discrimination is valid. * * * [T]he magnitude and scope of the discrimination have no bearing on the determinative question whether discrimination has occurred." 511 U.S. at 649-650 (emphasis added). The language from *Associated Industries* quoted by the court below rejected the assertion that the *potential* for the enactment of a discriminatory tax rate – even in a jurisdiction where a discriminatory tax rate *had not in fact been established* – rendered the tax regime unconstitutional. See *id.* at 654-655. That holding offers no support for the Oregon flat tax.

other states, they pay their Oregon tax at a higher effective rate per mile than do otherwise identical trucks that travel the same total number of miles but do so entirely in Oregon. And by definition, trucks that pay the Oregon flat tax pay both the flat fee to Oregon and highway taxes (on either a weight-mile or a flat-tax basis) to other states. An Oregon truck that travels the same number of miles but does so wholly intrastate pays only one tax.

Thus, as the court of appeals noted, the optional nature of the flat fee "may limit [its] discriminatory effect" (App., *infra*, 32a) by confining its benefits to a smaller number of favored truckers, but the fee continues to discriminate in favor of (selected) intrastate and against all interstate carriers. The Oregon Supreme Court did not suggest otherwise; it did not rely on the optional nature of the flat tax in rejecting the claim of discrimination.

***2. The decision below conflicts with the holdings of federal courts of appeals and state courts of last resort that empirical evidence is not necessary to demonstrate the discriminatory nature of a flat highway tax***

Given the inconsistency of the holding below with principles articulated by this Court, it is not surprising that the Oregon Supreme Court's decision flatly conflicts with the holdings of federal courts of appeals and other state courts of last resort. The Oregon court held that a plaintiff alleging discrimination under the Commerce Clause must present "evidence of an actual burden placed on interstate commerce." App., *infra*, 20a. Other courts, however, have rejected that proposition, holding that empirical proof of discrimination is *not* required to invalidate a flat highway tax on interstate transport under the Commerce Clause.

In *Trailer Marine Transport Corp.* v. *Vazquez*, 977 F.2d 1 (1st Cir. 1992), for example, the First Circuit struck down a

flat tax imposed on trailers by Puerto Rico to finance an accident compensation fund.[7] Despite the absence of empirical evidence establishing either the comparative effective rate of the tax as it applied to intrastate versus interstate trailers or the comparative costs imposed by those trailers on Puerto Rico, the court found that "the fee is clearly discriminatory in impact." *Id.* at 10. Speaking through Judge Boudin, the First Circuit explained:

> Under this fee structure a transient trailer * * * pays the same flat fee as local trailers * * * even though the transient trailers are presumptively going to cause far fewer accidents and impose far lower costs on the compensation fund than locally based trailers. The word "presumptive" has to be used in the absence of firm statistics; but the inference is so compelling that only the amount of discrimination, and not its fact, can plausibly be contested. * * * It does not matter whether the discrimination would actually force [the plaintiff] from the market or prevent certain goods from reaching Puerto Rico * * *. Once a state regulation or tax is found to *discriminate* against interstate commerce, it is presumptively invalid.

*Id.* at 10-11 (emphasis in original). Relying on *Scheiner*, the court added that it is "intuitively obvious" that, "on average," flat taxes impose higher per-mile charges on intrastate than on interstate vehicles. *Id.* at 11.

The Supreme Judicial Court of Massachusetts reached the same conclusion, striking down flat taxes on interstate motor carriers even in the absence of empirical evidence of discriminatory effect. Like the First Circuit, the Supreme Judi-

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[7] In reaching this conclusion, the First Circuit explained that "Puerto Rico is subject to the constraints of the dormant Commerce Clause doctrine in the same fashion as the states." 977 F.2d at 7.

cial Court explained that, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, it is intuitively obvious that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." *American Trucking Ass'ns, Inc.* v. *Sec'y of Administration*, 613 N.E.2d 95, 101 (Mass. 1993).

Other state courts of last resort agree. See *American Trucking Ass'ns, Inc.* v. *State*, 852 A.2d 142, 163 (N.J. 2004) (flat fees are "structurally discriminatory, and [interstate carriers] should not be compelled to prove the precise level of the per-activity cost disparity"); *id.* at 161 (citing *Secretary of Administration*, among other decisions, for the proposition that other courts "did not require the complaining party to submit specific proofs of actual discrimination"); *Commonwealth* v. *American Trucking Ass'ns, Inc.*, 746 S.W.2d 65, 67 (Ky. 1988) ("Foreign motor carriers engaged in interstate commerce invariably travel on average * * * far less miles in Kentucky than do carriers based in this state. For that reason the foreign motor carriers incur the greatest per mile cost imposed by the [flat] tax."); *American Trucking Ass'ns, Inc.* v. *Goldstein*, 541 A.2d 955, 957, 958 (Md. 1988) (allegation was that "interstate carriers[] might tend to travel fewer miles in Maryland and thus pay a higher per-mile price" under flat tax; court held that, "under the *Scheiner* majority's analysis of flat-rate highway taxes, it would seem clear that [Maryland's flat tax] is inconsistent with the Commerce Clause"). See also *Government Suppliers Consolidating Serv., Inc.* v. *Bayh*, 975 F.2d 1267, 1281 (7th Cir. 1992) (invalidating flat registration fee on haulers of municipal waste; "[f]or the truck that hauls garbage only occasionally, the per-haul cost of the registration fee will be many times the cost to a hauler of in-state waste"); *Black Beauty Trucking, Inc.* v. *Indiana*

*Dept. of State Rev.*, 527 N.E.2d 1163, 1165 (Ind. Tax 1988) ("[t]he discriminatory impact [of a flat tax] on the interstate carrier is readily apparent"); *American Trucking Ass'ns, Inc.* v. *State*, 556 N.W.2d 761, 768 (Wis. Ct. App. 1996) (invalidating flat tax absent empirical evidence).

The holding below, which required a showing deemed unnecessary by other courts, cannot be reconciled with these decisions. And the Oregon Supreme Court's departure from the approach taken by its sister courts – which goes to how taxpayers may establish a violation of the U.S. Constitution – involves a matter of considerable practical importance. Intervention by this Court to resolve this conflict accordingly is in order.

### 3. *The Oregon Supreme Court's reliance on* Michigan Public Service Commission *misunderstands this Court's holding and confuses the law*

The court below also erred in reasoning that this Court's holding in *Michigan Public Service Commission* stands for the proposition that empirical evidence showing an adverse effect on interstate commerce is necessary when challenging a flat tax that falls on the intrastate portion of an *interstate* journey. The Michigan tax upheld in that case assessed a "fee upon, and *only* upon, vehicles that engage in *intrastate* commercial operations – that is, on trucks that undertake *point-to-point hauls between Michigan cities*." 125 S. Ct. at 2422 (emphasis added). That consideration was crucial to the Court's decision. The Court emphasized that the Michigan fee fell "upon activities taking place exclusively within the State's borders." *Id.* at 2423. It noted that flat state licensing fees on such "local businesses and service providers" are, and always have been, ubiquitous. *Ibid.* And it distinguished *Scheiner* by emphasizing that a carrier becomes liable for the Michigan tax "only because it engages in *local*

business." *Id.* at 2425 (emphasis in original). It was this sort of tax on *intrastate* point-to-point carriage, the Court suggested, that would be upheld absent proof that it has an adverse impact on the movement of goods interstate. See *id.* at 2423-2424.

The Oregon flat tax is decisively different. Like the tax invalidated in *Scheiner* – and like the various flat taxes struck down by the decisions cited above – the Oregon levy is *not* limited to wholly in-state carriage. To the contrary, it applies to trucks that are simply traversing the State as part of an interstate journey; Oregon's highway tax (including both the weight-mile variant and, when elected, the flat tax) is "levied upon all trucks (interstate and intrastate) that use[] [Oregon's] roads, including trucks that merely crossed [the State's] borders to transport, say, [Washington] goods to [California] customers." *Michigan Pub. Serv. Comm'n*, 125 S. Ct. at 2425.[8] The tax invalidated in *Michigan Public Service Commission* thus "is distinguishable from * * * the fees invalidated in *Scheiner*" – and from the Oregon tax challenged here – "which applied to interstate trucks even when

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[8] Of course, the Oregon tax is "local" in the sense that it is imposed only upon the use of Oregon's highways, even though that use is part of a larger, interstate journey. But in that respect, the Oregon tax is identical to the Pennsylvania levy invalidated in *Scheiner* (and to all of the highway taxes struck down in the cases cited above). Pennsylvania necessarily imposed its tax on trucks "for the privilege of using [the] State's highway system" (483 U.S. at 269, 279); a state lacks the authority to tax travel that takes place on other states' highways. See *id.* at 284 n.16; 293-294. The crucial distinction between *Scheiner* and *Michigan Public Service Commission* is that the tax in the former was imposed upon trucks that were engaged in interstate journeys when they passed through the taxing jurisdiction, while the tax in the latter fell on a discrete local transaction that took place entirely within Michigan.

they engaged in *no* intrastate business." *Id.* at 2426 (Scalia, J., concurring in the judgment) (emphasis in original).[9]

The court below therefore misapprehended the import of *Michigan Public Service Commission*. In any event, as the decisions of other state and federal courts cited above make clear, *Scheiner* generally has been understood to require invalidation of flat taxes on motor carriers traveling interstate that are structured to discriminate against interstate commerce, even in the absence of empirical evidence establishing the magnitude of the discrimination. If that understanding is wrong, or if *Michigan Public Service Commission* changed the law, it should be this Court – and not the Supreme Court of Oregon – that says so.

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[9] That the Court regarded the local Michigan tax as different in kind from a levy that falls on use of a highway as part of an interstate journey also is made clear by what the Court identified as deficiencies in the plaintiffs' showing in *Michigan Public Service Commission*. The Court explained that the record did not show how often out-of-state trucks conducted local business in Michigan, whether the Michigan charge in fact discouraged such business, whether the possibility of obtaining a temporary permit alleviated the problem, whether a local commercial effect (if there was one) made a significant interstate difference, whether a variable fee would eliminate that difference, or whether the local fee "significantly deters interstate trade." 125 S. Ct. at 2424. The Court regarded the absence of such evidence as fatal to the challenge in *Michigan Public Service Commission*. But the Court struck down the tax in *Scheiner* even though the record in that case *also* lacked *any* evidence of that sort.

### *4. The Oregon Supreme Court's dismissal of the record evidence of discriminatory effect stated an erroneous legal standard and placed a nearly insuperable burden on taxpayers bringing challenges under the Commerce Clause*

Finally, the decision below is especially distressing because there *is*, in fact, compelling evidence in the record of this case establishing the discriminatory effect of Oregon's flat tax. The Oregon Supreme Court's dismissal of that evidence as nonprobative was premised on a clear misunderstanding of the governing legal standard. It also, we suggest, reflects the very sort of excessive sympathy for domestic competitive interests that the Commerce Clause was designed to overcome.

The record shows that carriers opting to pay the flat tax, in the aggregate, paid the Oregon highway levy at a lower rate than did other taxpayers (indeed, at a rate low enough that it increased the profit margin of the typical beneficiary by approximately fifty per cent). The record also establishes that the *overwhelming* majority of taxpayers paying the flat tax were based in Oregon. See pages 4-5, *supra*. The court below dismissed this evidence on the ground that "plaintiffs do not break down those figures between in-state and out-of-state trucking operations, or otherwise show how the aggregate savings serve to set the two groups apart." App., *infra*, 21a. This analysis is wrong, for several reasons.

*First*, the court's reasoning simply blinks reality. Only 38 of the 1094 carriers electing to pay the flat tax, operating only 129 out of 4401 trucks subject to the flat tax, were based out of state (see pages 4-5, *supra*); on this record, it is inconceivable that in-state operators did not reap the vast bulk of the tax savings (and the competitive advantage) provided by the flat tax mechanism. The contrary holding below suggests

an almost willful disregard of the advantage provided by Oregon's regime to in-state taxpayers. As the Court put it in *Maryland* v. *Lousiana*, 451 U.S. 725, 759-760 (1981): "It may be true that further hearings would be required to provide a precise determination of the extent of the discrimination in this case, but this is an insufficient reason for not now declaring the Tax unconstitutional and eliminating the discrimination. We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates."

*Second*, the Oregon Supreme Court evidently was of the view that a state tax is not discriminatory if some out-of-state taxpayers end up paying the tax at a lower effective rate than do some in-state taxpayers. See App., *infra*, 21a (to find discrimination court would have to assume "that out-of-state trucking operations somehow had been denied access to the benefits otherwise available to intrastate trucking firms and, therefore, had not contributed to the aggregate savings figures"). But this Court has rejected that view, explaining that the tax in *Scheiner* was not "saved because some out-of-state carriers which accrue high mileage in Pennsylvania pay the axle tax at a lower per-mile rate than some Pennsylvania-based carriers." 483 U.S. at 286. If the inherent tendency of the tax is to "exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure," the levy does not become immune from challenge because some out-of-state taxpayers obtain a lower effective rate by *yielding* to that pressure and concentrating their activities in the taxing state. *Ibid.*

*Third*, the reasoning of the court below missed the central point here. As the court of appeals correctly noted, "what matters under the dormant Commerce Clause is not where a carrier is based but where it does business; a Washington carrier that pays a flat fee in Oregon would have the same economic pressure to focus on Oregon intrastate business that exists for an Oregon carrier that chose that option. The Ore-

gon flat fee options provided in ORS 825.480 create disproportionate pressure that the dormant Commerce Clause forbids." App., *infra*, 35a. The evidence here shows indisputably that carriers benefit from a lower effective rate if they divert more of their business to Oregon. And that effect "necessarily violates the commerce clause because it puts interstate carriers at a disadvantage when compared with intrastate carriers." *Id.* at 37a.

We therefore submit that the court below erred when it required an empirical showing of discriminatory impact. And if we are wrong in that submission, the court committed a legal error in rejecting the showing of discrimination actually made in this case. In either event, the holding below has inadequate regard for an important federal constitutional guarantee and should be set aside.

### B. The Decision Below Misunderstood The Significance And Application Of The Commerce Clause Internal Consistency Test

The decision below also warrants review for a second reason. The Oregon Supreme Court held that the absence of internal consistency is immaterial if the activity or value subject to the challenged levy is not susceptible to taxation by multiple states. That conclusion, however, cannot be reconciled with decisions of this and other courts, which have applied the internal consistency test to evaluate the constitutionality of state levies that, in all relevant respects, were identical to the Oregon flat tax – and that held failure of the test to be fatal to those levies.

#### *1. Unapportioned flat taxes like Oregon's lack internal consistency*

To begin with, there is no doubt that the Oregon flat tax does lack internal consistency. As this Court has explained:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

*Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175, 185 (1995) (emphasis added).

The Oregon tax fails that test. If all states imposed Oregon's combination of flat and weight-mile highway taxes, high-mileage carriers operating interstate inevitably would be placed at a disadvantage. Once they exceeded the break-even point, intrastate carriers would receive "free miles"; otherwise identical interstate carriers would not get that benefit because they typically would not reach the break-even point in any one state. And as we have explained, to the extent that interstate operators *did* achieve break-even mileage in one (or more) states, they *still* inevitably would remain at a competitive disadvantage. Wholly intrastate operators could run an unlimited number of excess miles for free; their interstate competitors, in contrast, although traveling the same number of total miles, would pay not only the Oregon flat tax, but also weight-mile taxes (or additional flat taxes) in other jurisdictions. In either case, such a system "would place interstate commerce at a disadvantage as compared with commerce intrastate." *Jefferson Lines*, 514 U.S. at 185. Moreover, once a carrier elects to pay the flat tax in any one state, the lure of free miles in that state and the burden of paying additional taxes in other states would place "inexorable hydraulic pressure" on the carrier to concentrate its business in the jurisdiction to which it paid the flat tax. *Scheiner*, 483 U.S. at 286.

The Oregon Supreme Court did not dispute any of this. Instead, it was of the view that the internal consistency test is useful only in determining whether the same value or activity is subject to taxation by more than one state. Given that view of the test, the court held that, because Oregon's highway tax is "imposed upon an activity that takes place exclusively within this state's borders" – that is, use of Oregon's highways – "if every state replicated Oregon's flat-fee tax option under the same terms, we cannot hypothesize a scenario where the interstate commerce in logs, sand and gravel, or wood chips would be subject to multiple taxation or could be viewed as one state's attempt to take more than its fair share of taxes from transactions involving those commodities." App., *infra*, 18a. Because the court believed avoidance of duplicative taxation to be the only value served by internal consistency, it rejected the constitutional challenge here.

***2. The internal consistency test can be used to determine whether a state tax imposes discriminatory, structural burdens on interstate commerce***

The conclusion reached by the Oregon Supreme Court plainly was wrong. To be sure, the internal consistency test is useful in determining whether values subject to tax are properly apportioned between the states; "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from [an] interstate transaction." *Jefferson Lines*, 514 U.S. at 185. But because a state tax that fails the internal consistency test places interstate commerce at an insuperable structural disadvantage, failure of that test also demonstrates that the tax *discriminates* against interstate commerce. The Court has noted that point repeatedly. See *Tyler Pipe Indus., Inc.* v. *Washington State Dep't of Rev.*, 483 U.S. 232, 247 (1987) (describing the test's application to both the nondiscrimination and the apportionment requirements of the Commerce

Clause); *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 644 (1984) (same); *United States* v. *Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989) (failure of internal consistency test in *Scheiner* revealed that the effect of the Pennsylvania tax "was to subject out-of-state vehicles * * * to a much higher charge per mile traveled"). See also *American Trucking Ass'ns, Inc.* v. *State*, 852 A.2d at 163-164 (same).

That was the case in *Scheiner*. The highway tax at issue there was, in all the respects regarded as relevant by the court below, identical to the Oregon flat tax. As we have noted (see note 8, *supra*), both taxes were imposed on the use of the taxing state's highways; like Oregon's tax, the Pennsylvania levy posed no possibility of duplicative taxation or taxation of extraterritorial values. This Court nevertheless applied the internal consistency test to invalidate the flat Pennsylvania tax, finding that the absence of internal consistency meant that, if every state imposed an equivalent levy, "there is no conceivable doubt that commerce among the States would be deterred." 483 U.S. at 284 (footnote omitted). Like other taxes that failed the test, the Court added, the Pennsylvania tax "has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-287 (quoting U.S. Const. Art. I, § 8, cl. 3). That conclusion cannot be squared with the Oregon Supreme Court's decision.[10]

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[10] The same thing was true in *Armco*. There, the Court applied the internal consistency test to invalidate a West Virginia regime that imposed a tax on wholesaling and manufacturing, but exempted local manufacturers from the wholesaling tax. The problem was not that a multiple tax burden was imposed on a single interstate activity, but that the system gave preferential treatment to a tax-

### 3. *The holding below that a state highway tax cannot violate the internal consistency test because it does not pose the threat of duplicative taxation conflicts with the decisions of federal courts of appeals and other state courts of last resort*

The decision below also conflicts with the holdings of federal courts of appeals and other state courts of last resort, which have applied the internal consistency test to invalidate flat state highway taxes that, like Oregon's, were "imposed upon an activity that t[ook] place exclusively within th[e taxing] state's borders." App., *infra*, 18a. See *American Trucking Ass'ns, Inc.* v. *Sec'y of State*, 595 A.2d 1014, 1017 (Me. 1991) (flat tax imposed on transportation of hazardous materials on Maine highways "clearly violate[s] the 'internal consistency test'"); *American Trucking Ass'ns, Inc.* v. *Sec'y of Administration*, 613 N.E.2d at 101 (flat taxes on use of Massachusetts highways "appear to violate the internal consistency test because the imposition of the full measure of each fee is triggered by an interstate truck simply crossing the border of Massachusetts"); *American Trucking Ass'ns, Inc.* v. *State*, 852 A.2d at 164 (flat fee on collection or delivery of waste in New Jersey "fail[s] the internal consistency test"); *Commonwealth* v. *American Trucking Ass'ns, Inc.*, 746 S.W.2d at 67 (flat tax on use of Kentucky highways "falls when the 'internal consistency test' referred to in *Scheiner* is applied"). See also *Government Suppliers Consolidating Serv.*, 975 F.2d at 1282 (holding flat registration fee on vehicles transporting municipal waste unconstitutional under *Scheiner*'s internal consistency analysis because, "[i]f other states were to adopt registration fees similar to Indiana's, the divisive and disruptive effect on interstate commerce in mu-

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payer that conducted both activities in a single state. See 467 U.S. at 644-645.

nicipal waste would be magnified"); *American Trucking Ass'ns, Inc.* v. *State*, 556 N.W.2d at 766 (holding flat registration fee on transportation of hazardous materials unconstitutional because it violates internal consistency test).

### C. The Question Presented Here Is An Important And Recurring One

The Oregon Supreme Court's holding thus both departs from this Court's decisions and creates a conflict among the lower courts. Because questions about the validity of flat state taxes on interstate commerce – and, more broadly, about the means by which discrimination against interstate commerce may be established – are recurring ones of considerable importance, review by this Court is warranted.

As the conflict in the lower courts makes clear, jurisdictions across the Nation continue to impose unapportioned taxes on interstate commerce – and, indeed, many impose flat taxes on interstate motor carriers that, in the respects regarded as relevant by the Oregon Supreme Court, are indistinguishable from the flat tax at issue in this case. A number of states, for example, impose flat per-vehicle or per-carrier fees on transporters of hazardous materials.[11] The validity of

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[11] See, e.g., Cal. Veh. Code §2502(c) ($100 motor carrier permit fee and $75 motor carrier renewal permit fee); Col. Rev. Stat. Ann. § 42-20-202(1)(b), (c) (transporters of hazardous waste pay flat annual fee, depending on number of vehicles operated in State, of $10 to $400; $25 single trip permit); Conn. Gen. Stat. Ann. § 22a-454(a) ($500 annual fee on transporters of hazardous waste); Code Del. Reg. 10-400-007 ($300 annual fee on transporters of hazardous waste); Ga. Code § 46-11-4 (i) ($100 annual motor carrier company permit fee); Iowa Code Ann. § 455B.424(5)(c) ($25 fee for transporters of hazardous waste); Kan. Admin. Regs. 28-31-10(f) ($300 annual "monitoring fee" on transporters of hazardous waste); Md. Code Ann. Envir. § 7-252(a)(2), (b)(2)(ii) (annual $50 vehicle certificate fee for hazardous materials transporters; annual

the test used below to uphold the Oregon tax accordingly raises a vital question that is of national significance.

In addition, the Oregon Supreme Court's decision will encourage expanded use of unapportioned taxes by the states, as well as continued litigation about the validity of those levies. In response to the holding in *Scheiner*, several states candidly acknowledged that their flat motor carrier fees were unconstitutional.[12] But other states began a lengthy and continuing campaign to circumvent *Scheiner* by arguing, for example, that apportionment of their flat taxes was impracticable and therefore unnecessary,[13] or by contending that their taxes were per se nondiscriminatory and properly

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$20 driver certificate fee); Mich. C.L.A. § 29.473(b)(3) (in addition to apportioned fee, transporters of hazardous waste pay $50 "administrative fee"); Minn. Stat. Ann. § 221.0355(4)(b) (in addition to apportioned fee, transporters of hazardous waste pay $50 "processing fee"); Nev. Admin. Code § 459.9805(1)(b), (d) ($125 "general processing fee" for transporters of hazardous materials; $500 triennial "permit review fee"); N.Y. ECL § 72-0502 (hazardous waste transporter pays annual $500 fee for first vehicle, $200 fee for each additional vehicle; other waste transporters pay $250 annual fee for first vehicle and $100 for each additional vehicle); N.C. Gen. Stat. § 130A-294.1(j) ($600 annual fee on transporters of hazardous waste); Ohio Rev. Code § 4905.80(C)(1)(a) (in addition to apportioned fee, hazardous waste transporters pay $50 "processing" fee); Tex. Nat. Res. Code § 113.131 (d)(1) (liquefied petroleum gas trailers and delivery units pay flat annual fee of $100 to $300); Tex. Nat. Res. Code § 116.072 (c)(1) (trailers and delivery units transporting compressed natural gas pay flat annual fee of $100 to $500); Wy. Stat. § 37-14-103(a) ($200 fee for each package of radioactive material transported in State).

[12] See, *e.g.*, *Goldstein*, 541 A.2d at 957, 958; *American Trucking Assn's, Inc.* v. *Conway*, 566 A.2d 1335 (Vt. 1989).

[13] See, *e.g.*, *American Trucking Ass'ns* v. *State*, 556 N.W.2d at 767.

apportioned because they were "user fees,"[14] or by asserting that their flat taxes were supportable because the costs imposed upon the state through the taxpayer's use of its roads were unrelated to the miles traveled in the jurisdiction by the taxpayer.[15] The decision below, which accepted the argument that taxpayers must adduce some sort of special, empirical showing of discriminatory effect even when challenging a tax that imposes structural burdens on interstate commerce, marks the latest skirmish in this campaign and will provide powerful support and encouragement for additional litigation in this area.

Finally, this Court has recognized its special role in policing state actions that disadvantage interstate commerce. Whether or not "the facts of this particular case, viewed in isolation, * * * appear to pose any threat to the health of the national economy,"

> history, including the history of commercial conflict that preceded the constitutional convention as well as the uniform course of Commerce Clause jurisprudence animated and enlightened by that early history, provides the context in which each individual controversy must be judged. The history of our Commerce Clause jurisprudence has shown that even the smallest scale discrimination can interfere with the project of our federal Union. As Justice Cardozo recognized, to countenance discrimination of the sort that [Oregon's] statute represents would invite significant inroads on our "national solidarity."

*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 595 (1997) (quoting *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935)). In light of this important principle, the Court has acknowledged its "'duty to determine

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[14] See, *e.g.*, *Sec'y of Admin.*, 613 N.E.2d at 101-103.

[15] See, *e.g.*, *Sec'y of State*, 595 A.2d at 1016.

whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce.'" *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186, 201 (1994) (quoting *Best & Co.* v. *Maxwell*, 311 U.S. 454, 455-456 (1940)).

Here, the discriminatory impact is manifest. Because the decision below declined to remedy that discrimination, leaves the law in a state of considerable confusion, and addresses legal issues that are important and recurring ones, this Court should grant review.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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# APPENDIX

## APPENDIX A

IN THE SUPREME COURT OF OREGON

AMERICAN TRUCKING ASSOCIATIONS, INC., a District of Columbia Corporation, CRST, Inc., an Iowa corporation, USF Reddaway Inc., an Oregon corporation, Kenneth E. Mansigh Trucking, Inc., a Washington corporation, and Veneer Chip Transport, Inc., a Washington corporation, on behalf of themselves and all other Similarly-Situated Weight-Distance Taxpayers, Respondents on Review,

v.

STATE of Oregon, DEPARTMENT OF TRANSPORTATION and Grace Crunican, Director, Department of Transportation, Petitioners on Review, and AAA Oregon/Idaho, an Oregon corporation, Intervenor-Petitioner on Review.

**CC No. 00C16242; CA A117694; SC S51622, S51623.**

En Banc
On review from the Court of Appeals.*

Argued and Submitted May 10, 2005.
Decided Dec. 15, 2005.

De MUNIZ, J.

The issue in this case is whether the Oregon "flat fee" highway tax alternatives that are available to heavy trucks hauling certain commodities in either interstate or intrastate commerce violate the Commerce Clause of the United States Constitution.[1] American Trucking Associations, Inc., and

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* Appeal from Marion County Circuit Court, Claudia Burton, Judge. 193 Or.App. 185, 90 P.3d 15 (2004).

[1] Article I, section 8, clause 3, of the United States Constitution grants Congress the authority to "regulate Commerce * * * among the several States[.]" The United States Supreme Court has inter-

several other trucking companies (plaintiffs) sought a judgment declaring, among other things, that the provisions of ORS 825.480(1), (4), and (5)[2] that offer a flat-fee tax option

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preted that provision as imposing restrictions on state taxes, fees, or regulations that discriminate against or unduly burden interstate commerce. *See Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) ("we have consistently held this language to contain a further, negative command, known as the dormant Commerce Clause, prohibiting certain state taxation even when Congress has failed to legislate on the subject").

[2] Plaintiffs filed their first Amended Complaint in December 2000 under the 1999 version of ORS 825.480. With the exception of a rate increase implemented in 2003, however, the text of that provision has remained the same. Because the operative text has not changed since 1999, we use the current version of ORS 825.480 throughout this opinion. That version of the statute provides, in part:

> "(1)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in operating motor vehicles in the transportation of logs, poles, peeler cores or piling may pay annual fees for such operation computed at the rate of six dollars and ten cents for each 100 pounds of declared combined weight.
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> "(b) Any carrier electing to pay fees under this method may, as to vehicles otherwise exempt from taxation, elect to be taxed on the mileage basis for movements of such empty vehicles over public highways whenever operations are for the purpose of repair, maintenance, servicing or moving from one exempt highway operation to another.
>
> " * * * * * *
>
> "(4)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in the operation of motor vehicles equipped with dump bodies and used in the transportation of sand, gravel, rock, dirt, debris, cinders, asphaltic concrete mix,

to certain non-farm-use carriers, as well as similar provisions for farm-use trucks, violated the Commerce Clause. Plaintiffs also sought injunctive relief and a refund of taxes paid pursuant to those provisions. Defendants in the case are the Oregon Department of Transportation and its director, as well as intervenor-defendant AAA Oregon/Idaho. The trial court dismissed plaintiffs' action below. The Court of Appeals subsequently affirmed that judgment as to the flat-fee alternatives for farm-use trucks, but reversed regarding the tax alternatives for non-farm-use trucks. The Court of Appeals concluded that the flat-fee alternatives for non-farm-use carriers violated the Commerce Clause by creating a fee

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metallic ores and concentrates or raw nonmetallic products, whether crushed or otherwise, moving from mines, pits or quarries may pay annual fees for such operation computed at the rate of six dollars and five cents for each 100 pounds of declared combined weight.

"(b) Any carrier electing to pay fees under this method may, as to vehicles otherwise exempt for taxation, elect to be taxed on the mileage basis for movements of such empty vehicles over public highways whenever operations are for the purpose of repair, maintenance, servicing or moving from one exempt highway operation to another.

"(5)(a) In lieu of other fees provided in ORS 825.474, carriers engaged in operating motor vehicles in the transportation of wood chips, sawdust, barkdust, hog fuel or shavings may pay annual fees for such operation computed at the rate of twenty-four dollars and sixty-two cents for each 100 pounds of declared combined weight.

"(b) Any carrier electing to pay under this method may, as to vehicles otherwise exempt from taxation, elect to be taxed on the mileage basis for movement of such empty vehicles over public highways whenever operations are for the purpose of repair, maintenance, service or moving from one exempt highway operation to another."

structure that had a discriminatory effect on trucks engaged in interstate commerce. *American Trucking Assns., Inc. v. State of Oregon*, 193 Or.App. 185, 90 P.3d 15 (2004). We allowed defendant's petition for review and now reverse the Court of Appeals decision as it pertains to non-farm-use carriers, otherwise affirm the remainder of that decision, and affirm the trial court's judgment.

We take the relevant facts from the opinion of the Court of Appeals.

> "The primary method under which Oregon taxes heavy trucks that use its highways is a weight-mile tax. ORS 825.450-825.555. Under that tax, a trucking carrier pays a rate for each mile that its trucks operate on the state's public highways. The tax is based on the weight that the carrier declares to be the truck's maximum legal weight; the higher the declared weight, the higher the per-mile tax for that truck. ORS 825.474-825.476. A truck that pays the weight-mile tax does not pay the fuel tax that the state charges other vehicles and may take any fuel tax paid as a credit against the weight-mile tax. ORS 825.486. A carrier must maintain records of the declared weights of its trucks and the miles that they travel in order to make the required reports and calculate the amount of tax owed.
>
> "Plaintiffs do not question the constitutionality of the weight-mile tax itself. Rather, they attack two exceptions to it.[3] The first exception concerns the flat fee

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[3] The second weight-mile tax exception at issue on appeal involved the exception for farm vehicles set forth in ORS 825.480(3). As already noted above, the Court of Appeals affirmed the trial court's judgment regarding that issue, and the parties have not raised it on review. Consequently, we do not address that issue here.

options provided in ORS 825.480 for certain commodities. That statute gives carriers of three categories of commodities-- logs, sand and gravel carried in dump trucks, and wood chips--the option to choose to pay a flat fee rather than the weight-mile tax. ORS 825.480(1), (4), and (5). For each commodity, the legislature established the fee at an amount that it believed to be identical to what a truck of the same weight carrying that commodity would pay in weight-mile tax if it operated as many miles per year as an average truck that carried that commodity. *The calculations are based on the assumption that the truck in question operates entirely in Oregon.* The flat fee option is available to carriers who are located in Oregon or any other state. The legislature has adjusted the amounts a number of times in order to reflect changes in the average mileage and in the weight-mileage rates since it originally adopted the flat fee options. If a carrier elects a flat fee option, it must do so for all the trucks in its fleet that carry that commodity, and it may make that election only once per year. ORS 825.480(2). A carrier that chooses to pay a flat fee must still report the mileage that it travels on public highways, OAR 740-055-0120; however, because those reports do not affect the taxes that the carrier pays, the state does not audit them.

"Trucks carrying commodities that have a flat fee option are more likely than trucks carrying other commodities to use nonpublic roads for significant portions of their trips, to use lesser-traveled public roads, and to make multiple short journeys. All of those factors make it more difficult for carriers to keep the records that the weight-mile tax requires and for the state to enforce the tax. Flat fee carriers also tend to be small operators, for whom record-keeping is especially burdensome. Thus, one purpose of the

> flat fee option is to ease the burden on both the carriers and the state of administering and enforcing the weight-mile tax.
>
> "Although the legislature intended the flat fee options to be revenue neutral, they are not, at least for haulers of logs or of sand and gravel. The best estimates, based on data that are not fully reliable, are that, for the most recent period for which figures were available at the time of trial, wood chip carriers who chose the flat fee option as a group paid $27,315.75 more than they would have paid under the weight-mile tax, while sand and gravel carriers paid $276,535.86 less and log carriers paid $1,164,585.86 less. For sand and gravel carriers, the underpayments are equivalent to 1.34 cents per mile, while for log carriers they are equivalent to 1.9 cents per mile. For purposes of comparison, the average profit margin in the trucking industry is 3 cents per mile."

193 Or.App. at 188-90, 90 P.3d 15 (footnote omitted; emphasis added).

On appeal, plaintiffs argued, in part, that, under *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), the highway fees at issue were malapportioned and therefore discriminatory in their practical effect. Specifically, plaintiffs argued that *Scheiner* supported the notion that the Oregon flat-fee tax options for trucks carrying logs, sand and gravel, or wood chips impermissibly exerted a "hydraulic pressure" on out-of-state motor carriers hauling those commodities to concentrate their activities in-state to fully take advantage of the flat-fee system. That was so, plaintiffs maintained, because any advantage to be obtained under the flat-fee system--presumably by driving more miles within Oregon than outside of it--would invariably be more available to an Oregon-based motor carrier than to an

out-of-state carrier. The result, plaintiffs maintained, was inherently discriminatory.

The Court of Appeals agreed. Drawing on *Scheiner's* iteration of the Supreme Court's "internal consistency" test,[4] the Court of Appeals set out the following hypothetical scenario:

> "Here, the focus is on carriers whose trucks travel more miles in Oregon than the amount that the legislature presumed. As one example, assume that the weight-mile tax for a particular truck is 10 cents per mile, that the legislature presumes that the average truck carrying the commodity involved will travel 40,000 miles per year in Oregon, and that the legislature has therefore set an alternative flat fee at $4,000 per year. Carrier A has trucks that actually travel 50,000 miles entirely in Oregon; it elects to pay the flat fee and therefore pays $4,000 per truck, or an effective rate of 8 cents rather than 10 cents per mile. Carrier B has trucks that also operate 50,000 miles, but they operate half the time in Oregon and half the time in other states with identical tax systems. Carrier B would lose money by electing to pay the flat fee in any state that has such a taxing scheme because the flat fee is calculated on an amount of mileage greater than its trucks will travel in any one state. Thus, economic necessity requires carrier B to elect to be taxed on the basis of its mileage, and its total taxes will be $5,000 per truck, or an effective rate of 10 cents per mile. Such a taxing scheme favors intrastate carriers over interstate carriers. Any other hypothetical situation, using any other figures for an

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[4] The "internal consistency" test is a component of the framework used to determine whether state-levied taxes and fees affecting interstate commerce have been fairly apportioned. The test is discussed in greater detail below.

> unapportioned flat fee option, will show a similar malapportionment and discriminatory effect as to interstate carriers that exceed the presumed average mileage.
>
> "In this hypothetical situation, the flat fee option will both exert pressure on the interstate carrier to change its operations to focus on intrastate business and will discriminate against the interstate carrier if it does not do so. Only by focusing on intrastate business can the carrier pay the lower tax rate that similarly situated intrastate carriers are able to pay. The flat fee options, thus, discriminate between interstate and intrastate carriers whose businesses differ only because of their relationship to state boundaries, and the discrimination operates to the detriment of the interstate carrier. The flat fee options do not apportion the tax burden among the states where the interstate carrier operates, and they therefore fail the 'internal consistency' test."

*American Trucking*, 193 Or.App. at 195-96, 90 P.3d 15 (footnotes omitted). As a result, the Court of Appeals concluded that the flat-fee options before it violated the Commerce Clause and were therefore unconstitutional. This court subsequently accepted review to consider that constitutional issue.

Although the Commerce Clause is framed as an affirmative grant of commerce-regulating power to Congress, the United States Supreme Court has interpreted the clause to also embody an implicit negative command forbidding states from enacting laws that interfere with the flow of free trade across the nation. *See, e.g., Oregon Waste Systems, Inc. v. Environmental Quality Commission of the State of Oregon*, 511 U.S. 93, 98, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (Commerce Clause contains " 'negative' aspect that denies the States the power unjustifiably to discriminate against or

burden" interstate commerce). At the same time, the Court also has made clear that the Commerce Clause will not excuse interstate commerce from shouldering its fair share of state tax burdens as it makes its way:

> "[D]ecisions of this Court, particularly during recent decades, have sustained nondiscriminatory properly apportioned state corporate taxes upon foreign corporations doing an exclusively interstate business when the tax is related to a corporation's local activities and the State has provided benefits and protections for those activities for which it is justified in asking a fair and reasonable return."

*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 287, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), *quoting Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108, 95 S.Ct. 1538, 44 L.Ed.2d 1 (1975). The respective values underlying each of those ideas--the value of facilitating a free flow of commerce between the states and the value of making such commerce pay its way in the process--can, in practical application, often clash if not carefully regulated.

In seeking to maintain the boundaries that allow those frequently competing priorities to operate in harmony, we are faced, at the outset, with a problem common to most courts considering a Commerce Clause issue today: What is the proper analytical framework for examining the case at hand? That question stems, in part, from the plethora of different tests that the Supreme Court has created over the years to analyze state taxation and fee-setting measures that implicate interstate commerce.[5] The result, as the Court itself has de-

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[5] The following list is by no means exhaustive: *Oregon Waste Systems, Inc. v. Environmental Quality Commission of the State of Oregon*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994) (facially different state treatment of in-state and out-of-state economic interests that benefit the former and burden the latter is *per se* invalid under Commerce Clause, unless state can show legiti-

scribed it, often resembles a "quagmire" of differently phrased tests that rarely offer explicit guidance, outside of fact-matching, as to when and under what circumstances a particular test should be applied. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 315, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992) (noting that "our law in this area is something of a 'quagmire'"); *Scheiner*, 483 U.S. at 280, 107 S.Ct. 2829 (recognizing that past Commerce Clause decisions have been described as a " 'quagmire' of judicial responses"). Here, the question of how to analyze this Commerce Clause issue is particularly important because the parties begin by

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mate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives); *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) (state tax does not discriminate in violation of Dormant Commerce Clause if it possesses internal consistency, i.e., if same tax could be applied by every other state with no impermissible interference with free trade); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (state tax statute will be sustained against Commerce Clause challenge if taxed activity has a substantial nexus with the state and tax is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by state); *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 716-17, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) (state toll is constitutional when based on fair approximation of use or privilege to use that does not discriminate against interstate commerce and is not excessive in relation to benefits conferred, even though alternative formula might better reflect use of facilities by individual users); *Pike v. Bruce Church*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970) (state regulation effectuating legitimate public purpose and having only incidental effect on interstate commerce will be upheld against Commerce Clause challenge unless burden imposed clearly exceeds local benefits; extent of burden tolerated depends on nature of local interest).

presenting this court with competing viewpoints on which test is the proper one to use.

Defendants urge us to analyze the fee scheme now before us as a "use" tax under the test set out in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). In *Evansville-Vanderburgh*, the Supreme Court considered whether the Commerce Clause allowed state and municipal governments to impose a $1.00 service charge for each passenger boarding commercial aircraft at local airports. Analogizing those charges to highway tolls, the Court ultimately upheld the constitutionality of such fees, articulating, in the process, the following test:

> "At least so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *Capitol Greyhound [Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950)], and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users."

*Id.* at 716-17, 92 S.Ct. 1349. Defendants argue that, because the flat-fee option is essentially an assessment for highway use with its proceeds dedicated to Oregon highways, the fee should be scrutinized as a use tax using the framework described above rather than the somewhat more stringent tests often applied to general revenue-raising measures.

In response, plaintiffs contend that the four-factor test of *Complete Auto Transit* represents the appropriate analysis to be applied here. At issue in *Complete Auto Transit* was a Mississippi tax statute that required all businesses engaged in transporting persons or property for hire to pay a percentage of gross income for the privilege of operating within the

state. The Supreme Court upheld the tax against the out-of-state plaintiff's Commerce Clause challenge, relying on the consistency of its decisions sustaining similar taxes

> "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

430 U.S. at 279, 97 S.Ct. 1076. Plaintiffs point in particular to the fair apportionment and nondiscrimination elements of the test, arguing that whether a state tax or fee meets those two requirements is a matter further subject to a separate test for "internal consistency." Explaining the nature of internal consistency in *Armco Inc. v. Hardesty*, 467 U.S. 638, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984), the Supreme Court wrote:

> "In *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), the Court noted that *a tax must have 'what might be called internal consistency--that is the [tax] must be such that, if applied by every jurisdiction,' there would be no impermissible interference with free trade.* In that case, the Court was discussing the requirement that a tax be fairly apportioned to reflect the business conducted in the State. A similar rule applies where the allegation is that a tax on its face discriminates against interstate commerce. A tax that unfairly apportions income from other States is a form of discrimination against interstate commerce."

*Id.* at 644, 104 S.Ct. 2620 (emphasis added). Plaintiffs contend that the flat-fee option at issue here lacks internal consistency, rendering the fee malapportioned and discriminatory for purposes of interstate commerce and,

therefore, unable to withstand constitutional scrutiny under the *Complete Auto Transit* test.

Although both tests appear to remain viable as Supreme Court precedents in that neither has been overruled by a subsequent decision, several factors weigh heavily in favor of using *Complete Auto Transit's* analytical framework here rather than the *Evansville-Vanderburgh* test. First, aside from the *Evansville-Vanderburgh* case itself, the test articulated therein has never actually been used again by a majority of the Court to decide a Commerce Clause controversy. Following the *Evansville-Vanderburgh* decision, Congress

> "concluded that the proliferation of local taxes burdened interstate air transportation, and, when coupled with the federal Trust Fund levies, imposed double taxation on air travelers. To deal with these problems, Congress passed § 7(a) of the Airport Development Acceleration Act of 1973[.]"

*Aloha Airlines, Inc. v. Director of Taxation of Hawaii*, 464 U.S. 7, 9-10, 104 S.Ct. 291, 78 L.Ed.2d 10 (1983) (footnote omitted). The new federal statute essentially nullified the effect of *Evansville-Vanderburgh* on air travel by prohibiting the states from levying any fee on individuals traveling by air or on the activities associated with transporting them. *Id.* at 10, 104 S.Ct. 291. Since then--perhaps out of an abundance of caution--none of the 12 Supreme Court cases citing *Evansville-Vanderburgh* has employed its test to resolve a Commerce Clause dispute.[6]

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[6] The Supreme Court has, however, used the test for other purposes. In *Commonwealth of Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403, (1978), the Court used the test-- substituting the phrase "state function" for "interstate commerce"--to hold that a federal registration tax on civil aircraft did not violate the implied immunity of a state government from federal taxation. *In Northwest Airlines, Inc. v. County of Kent,*

Second--in contrast to the *Evansville-Vanderburgh* framework--*Complete Auto Transit's* four-factor test represents an important shift in the Supreme Court's Commerce Clause jurisprudence and has seen regular and recent use. Prior to *Complete Auto Transit*, the old rule had been that state taxes levied on the "privilege" of doing business within a state were *per se* unconstitutional when applied to what was exclusively interstate commerce. *See Spector Motor Service v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951) (so stating). At the same time, the Court consistently had recognized that interstate commerce could be made to pay its way as it moved through the states. The result was that, by the time of *Complete Auto Transit*, the old rule had been stripped of most of its practical significance, and replaced, instead, with a formalistic exercise that often focused more on eliminating words such as "privilege" from commerce-related statutes rather than examining the statutes' practical effects. For example, under the old rule, the Supreme Court struck down a Virginia statute creating a "license tax" on gross business receipts levied for the "privilege

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*Michigan*, 510 U.S. 355, 114 S.Ct. 855, 127 L.Ed.2d 183 (1994), the Court also used the test to ascertain whether fees assessed against commercial airlines for the use of a county's airport facilities were reasonable under the federal Anti-Head Tax Act. At the end of the day, the only other case in which a majority of the Court has used the *Evansville-Vanderburgh* test in a Commerce Clause context is *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226. In deciding *Scheiner*, however, the Court did not actually apply the *Evansville-Vanderburgh* test as its controlling rationale; instead, the Court relied upon the internal consistency test set out in *Armco*, 467 U.S. at 644, 104 S.Ct. 2620 for that purpose. The Court cited the *Evansville-Vanderburgh* test primarily to refute the State of Pennsylvania's argument that the taxes at issue in *Scheiner* were just like the user fees that the Court had upheld in *Evansville-Vanderburgh*.

of doing business" in the state. *See Railway Express Agency v. Virginia*, 347 U.S. 359, 74 S.Ct. 558, 98 L.Ed. 757 (1954) (so holding). Several years later, the Court upheld an amended version of the same statute, reworded to impose a "franchise tax" on a business's "going concern" value as measured by its gross receipts. *See Railway Express Agency v. Virginia*, 358 U.S. 434, 79 S.Ct. 411, 3 L.Ed.2d 450 (1959) (so holding). In *Complete Auto Transit*, the Court recognized that no real economic difference had resulted from manipulating the wording of those statutes and that its old rule of *per se* unconstitutionality had been reduced, in large part, to an axiom that often distracted courts from the more critical inquiry "into whether the challenged tax produced results forbidden by the Commerce Clause." 430 U.S. at 285, 97 S.Ct. 1076. The Court then expressly rejected its old rule. The four-factor test that replaced it was, if nothing else, an effort to better focus the judiciary on the actual concerns that the Commerce Clause was intended to address.

Since that time, to the extent that one test can be singled out as surfacing with regularity among Supreme Court Commerce Clause cases, *Complete Auto Transit's* four-part analysis is conspicuous for having appeared with greater frequency and in a broader range of substantive applications than the *Evansville-Vanderburgh* test.[7] More importantly, the Court cited the *Complete Auto Transit* test with apparent

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[7] See, *e.g.*, *Oklahoma Tax Commission*, 514 U.S. 175, 115 S.Ct. 1331 (applying test to sales tax on bus tickets); *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989) (applying test to tax on telephone calls); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988) (applying test to state use tax); *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983) (applying test to franchise tax); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct 2946, 69 L.Ed.2d 884 (1981) (applying test to severance tax).

approval in deciding *American Trucking Associations, Inc. v. Michigan Public Service Commission*, ___ U.S. ____, 125 S.Ct. 2419, 162 L.Ed.2d 407 (2005), the Court's most recent Commerce Clause decision. That case, like this one, concerned a flat-fee assessment on intrastate hauling. As a result of that similarity, along with the other reasons discussed above, we conclude that *Complete Auto Transit's* four-factor test is the more appropriate analytical format for reviewing the issues presented here. Under that test, a state tax will survive Commerce Clause scrutiny if (1) the taxed activity has a sufficient nexus with the state to justify the tax; (2) the tax is fairly apportioned; (3) the tax does not discriminate against interstate commerce; and (4) the amount of the tax is fairly related to the benefits provided to the taxpayer.[8] 430 U.S. at 279, 97 S.Ct. 1076. We turn now to that inquiry.

As the parties have framed the issues on review, this case arguably implicates only the apportionment and discrimination prongs of the *Complete Auto Transit* analysis. On appeal, the Court of Appeals agreed with plaintiffs that, under *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226, and its application of the internal consistency test, the flat-fee option at issue here was both malapportioned and discriminatory. Plaintiffs now essentially urge this court to do the same. We turn first to the apportionment question.

In *Goldberg v. Sweet*, 488 U.S. 252, 109 S.Ct. 582, 102 L.Ed.2d 607 (1989), the Supreme Court stated that, with regard to interstate commerce, the requirement of proper apportionment is aimed at preventing individual states from taxing more than their fair share of an interstate transaction:

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[8] Although defendants argue that other tests are more appropriate, they have nevertheless presented alternative arguments using the four-factor analysis of *Complete Auto Transit* to support their positions on review.

> "In analyzing these contentions, we are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."

*Id.* at 260-61, 109 S.Ct. 582. A state tax is fairly apportioned for purposes of interstate commerce if it is both internally and externally consistent. The parties do not contest the external consistency of the flat-fee option in this case.[9] Plaintiffs, however, argue that Oregon's flat-fee option lacks internal consistency.

To be internally consistent, "a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Id.* at 261, 109 S.Ct. 582. To examine a tax for malapportionment, the internal consistency test essentially extrapolates a hypothetical application of the challenged state tax or fee across all the states and scrutinizes the results for signs of overreaching:

> "This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. *A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction*, since allowing such a tax in one State would place interstate com-

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[9] External consistency focuses on the economic justification underlying a state's claims upon a particular value being taxed. *Oklahoma Tax Commission*, 514 U.S. at 185, 115 S.Ct. 1331. A tax that possesses external consistency will not reach beyond the value that is fairly attributable to the economic activity within the taxing state. *Id.* As noted above, the external consistency of the flat-fee option is not at issue here.

> merce at the mercy of those remaining States that might impose an identical tax."

*Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (emphasis added).

Here, applying the internal consistency test, we discern no apportionment problem under the *Complete Auto Transit* analysis. The flat-fee option is aimed at operations that take place primarily in Oregon. If viewed as a tax, it is one imposed upon an activity that takes place exclusively within this state's borders. The flat fee does not tax an interstate truck's entry into this state, nor does it tax transactions spanning multiple states. As a result, if every state replicated Oregon's flat-fee tax option under the same terms, we cannot hypothesize a scenario where the interstate commerce in logs, sand and gravel, or wood chips would be subject to multiple taxation or could be viewed as one state's attempt to take more than its fair share of taxes from transactions involving those commodities.

That said, however, the remaining issue under the test set out in *Complete Auto Transit* is perhaps the most important: Does the flat-fee option at issue here nevertheless discriminate against interstate commerce? In concluding that it did, the Court of Appeals essentially melded the concepts of apportionment and discrimination together and assumed that, just as hypothetical projections could be used to show malapportionment under the internal consistency test, similar hypothetical projections could also be used to infer discrimination. Indeed, on review, plaintiffs assert that no record evidence is needed to prove that the flat-fee option is discriminatory here. Plaintiffs argue that the flat-fee option creates a forbidden incentive for trucking companies that do business in Oregon and elsewhere to concentrate their operations within this state; *Scheiner*, they contend, illustrates that

such incentives alone are enough to violate the Commerce Clause.

In any event, plaintiffs contend that the record in this case clearly establishes discrimination in practical effect. Plaintiffs point in particular to trial court findings that show, according to a study done in 2000, that sand and gravel haulers utilizing the flat-fee option paid, in the aggregate, almost $300,000 less than they would have paid under the weight-mileage alternative, while log haulers using the flat fee realized a similar savings of over $1 million. Noting that the flat-fee option is utilized almost solely by Oregon-based motor carriers that operate predominately or exclusively within the state, they argue that, as with all flat highway taxes, the flat-fee option inevitably will cost state-based, heavy users of Oregon's highways less per mile than the alternative weight-mile tax will cost interstate users who have less occasion to use Oregon roads. That result, they maintain, is inherently discriminatory. Those propositions, however, are incorrect for several reasons.

First, the Supreme Court has never viewed hypothetical possibilities, standing alone, as sufficient to constitute unconstitutional discrimination for Commerce Clause purposes:

> "On the contrary, we repeatedly have focused our Commerce Clause analysis on whether a challenged scheme is discriminatory in 'effect,' and we have emphasized that 'equality for the purposes of * * * the flow of commerce is measured in dollars and cents, not legal abstractions.' "

*Associated Industries of Missouri v. Lohman*, 511 U.S. 641, 654, 114 S.Ct. 1815, 128 L.Ed.2d 639 (1994) (internal citations omitted). Therefore, aside from laws discriminating against interstate commerce on their face, *see Fulton Corp. v. Faulkner*, 516 U.S. 325, 331, 116 S.Ct. 848, 133 L.Ed.2d 796 (1996) ("[s]tate laws discriminating against interstate commerce on their face are 'virtually *per se* invalid.'"), issues

involving discrimination against interstate commerce must involve "substantial distinctions and real injuries." *Lohman*, 511 U.S. at 654, 114 S.Ct. 1815 (*quoting Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481, 52 S.Ct. 631, 76 L.Ed. 1232 (1932)). The flat-fee option here, of course, does not facially discriminate against interstate commerce. Interstate and intrastate operations alike are free to either pay the weight/mile tax or the flat fee if they haul commodities covered by ORS 825.480. In short, eligibility for the flat fee is determined solely by the commodities hauled, not by the location of the carrier.

Second, plaintiffs' assertion that the Supreme Court's finding of discrimination in *Scheiner* was not a fact-based determination misapprehends the record that was before the Court in that case. At issue in *Scheiner* were two different Pennsylvania flat-tax schemes. 483 U.S. at 273-75, 107 S.Ct. 2829. Both were levied on all commercial trucks operating in the state in return for the privilege of using the state's highways. The Court noted that, facially, the taxes did not discriminate between in-state and out-of-state trucks in allocating tax burdens. *Id.* at 281, 107 S.Ct. 2829. Based on the evidence before it, however, the Court found that the Pennsylvania-based trucks subject to the flat taxes traveled approximately five times as many miles within Pennsylvania as did their out-of-state counterparts. *Id.* at 276, 107 S.Ct. 2829. Correspondingly, the Court found that, based on the record before it, the cost per mile of those taxes was approximately five times as high for out-of-state trucks as for local vehicles. *Id.* It was that evidentiary record that rendered the Pennsylvania taxes "plainly discriminatory," *id.* at 286, 107 S.Ct. 2829, not, as plaintiffs suggest, a hypothetical construct.

Here, in contrast, plaintiffs present no evidence of an actual burden placed on interstate commerce by Oregon's flat-fee option, or any instance where use of the flat fee has, in fact, discriminated against interstate commerce. Plaintiffs

point only to the aggregate savings realized under the flat fee as evidence of discriminatory effect. Unlike the plaintiffs in *Scheiner*, however, plaintiffs do not break those figures down between in-state and out-of-state trucking operations, or otherwise show how the aggregate savings serve to set the two groups apart. As a result, to find discrimination against interstate commerce in this case, we would be forced to assume that out-of-state trucking operations somehow had been denied access to benefits otherwise available to intrastate trucking firms and, therefore, had not contributed to the aggregate savings figures found by the trial court. Nothing in the record, however, supports that finding.[10] Consequently, there is nothing to show that the flat-fee option before us effectively has created an unconstitutionally protected trade area that prefers local commerce over interstate commerce.

Finally, the Supreme Court's recent decision in *American Trucking Associations, Inc. v. Michigan Public Service Commission*, ___ U.S. ____, 125 S.Ct. 2419, 162 L.Ed.2d 407, effectively refutes plaintiffs' argument regarding the general discriminatory effect of locally focused flat fees. At issue in *Michigan Public Service Commission* was a $100 dollar [*sic*] annual state fee levied on all trucks in Michigan making intrastate deliveries. The primary plaintiff in that case, American Trucking Associations, Inc.--the same primary plaintiff in the case now before this court-argued, much

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[10] The record, in fact, suggests the opposite. As the trial court noted in its findings of fact, out-of-state sand and gravel carriers accounted for only 13.33 percent of Oregon's total flat-fee sand and gravel mileage logged during 2000. At the same time, those same out-of-state carriers garnered 31 percent of the overall savings attributed to sand and gravel haulers as a whole. Translated into savings-per-mile, the out-of-state haulers saved an average of four cents per mile compared to weight-mile taxpayers, while in-state sand and gravel carriers saved an average of 1.5 cents per mile.

as it does here, that the fee in question was discriminatory because trucking companies that worked solely within Michigan would drive far more miles within the state than their counterparts that also made interstate deliveries, thereby obtaining a greater cost-per-mile benefit from the fee than the interstate haulers. Those financial incentives, the plaintiffs argued, would exert an impermissible "hydraulic pressure" on out-of-state truckers to concentrate their hauling in Michigan. The Supreme Court rejected that argument, however, concluding, as the Michigan Court of Appeals had pointed out, that, without more, the record contained little, if any, evidence of a significant practical burden on interstate commerce. *Id.* at 2423-24, 125 S.Ct. 2419.

The same is true here. If nothing else, *Michigan Public Service Commission* makes clear that plaintiffs cannot rely on hypothetical assertions to establish the existence of discriminatory economic effects; plaintiffs must demonstrate actual discrimination. If plaintiffs' arguments to the contrary were well-taken, not only would the Supreme Court have reached a different outcome in *Michigan Public Service Commission*, but virtually every uniformly assessed local fee would be in jeopardy if it touched some aspect of interstate commerce. That, of course, is not the aim of the Commerce Clause. *See, e.g., Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 623-24, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (Dormant Commerce Clause does not seek "to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."). Having been presented with no evidence of discrimination or malapportionment in this case aside from plaintiff's hypothetical projections, we cannot conclude, on this record, that the flat-fee option at issue here violates the Commerce Clause.

The decision of the Court of Appeals pertaining to non-farm-use carriers is reversed, the remainder is otherwise affirmed, and the judgment of the circuit court is affirmed.

## APPENDIX B

Court of Appeals of Oregon.

AMERICAN TRUCKING ASSOCIATIONS, INC., a District of Columbia corporation; CRST, Inc., an Iowa corporation; USF Reddaway, Inc., an Oregon corporation; Kenneth E. Mansigh Trucking, Inc., a Washington Corporation; and Veneer Chip Transport, Inc., a Washington corporation, on behalf of themselves and all other similarly-situated weight-distance taxpayers, Appellants,

v.

STATE of Oregon, Department of Transportation and Director Grace Crunican, Department of Transportation, Respondents, and AAA Oregon/Idaho, an Oregon corporation, Intervenor-Respondent.

**00C-16242; A117694.**

Argued and Submitted Oct. 15, 2003.

Decided April 28, 2004.

Before Edmonds, Presiding Judge, and Wollheim and Brewer, Judges

EDMONDS, P.J.

Plaintiffs, the American Trucking Associations, Inc., and several individual trucking companies, assert that two aspects of the manner in which the state of Oregon taxes heavy trucks that use its highways violate the dormant Commerce Clause of the federal constitution. Those aspects are the flat fee options for certain commodities and the farm truck fuel tax; we describe them in detail below.[1] Plaintiffs sought a declaratory judgment, an injunction, and a refund of taxes

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[1] The tax court's jurisdiction does not extend to disputes over motor carrier taxes. ORS 305.410(1)(g). The Marion County Circuit Court therefore had jurisdiction of this case.

paid. Defendants are the State of Oregon, the Oregon Department of Transportation, the department's director, and intervenor-defendant AAA Oregon/Idaho. The trial court held in favor of defendants and dismissed the action.[2] We reverse as to the flat fee options and affirm as to the farm truck fuel tax.

We state the facts as we find them on de novo review, which is generally consistent with the trial court's findings.[3] However, we draw our own legal conclusions from those facts. The primary method under which Oregon taxes heavy trucks that use its highways is a weight-mile tax. ORS 825.450-825.555. Under that tax, a trucking carrier pays a rate for each mile that its trucks operate on the state's public highways. The tax is based on the weight that the carrier declares to be the truck's maximum legal weight; the higher the declared weight, the higher the per-mile tax for that truck. ORS 825.474-825.476.[4] A truck that pays the weight-mile

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[2] The trial court dismissed the action rather than entering a declaration of the parties' rights. Although the parties do not raise the point, that action was erroneous. "If there is a justiciable controversy, the plaintiff is entitled to a declaration of its rights, even if that declaration is directly contrary to what it believes its rights to be." *Beldt v. Leise*, 185 Or.App. 572, 576, 60 P.3d 1119 (2003). On remand, the trial court should enter a judgment that declares the parties' rights on the issues in dispute.

[3] The parties assume that a declaratory judgment action is legal in nature and that we review the trial court's findings for any evidence to support them. However, a declaratory judgment action may be either legal or equitable, depending on the nature of the case and the relief sought. *Ken Leahy Construction, Inc. v. Cascade General, Inc.*, 329 Or. 566, 571, 994 P.2d 112 (1999). In this case, the relief that plaintiffs seek is primarily equitable, and our review is *de novo*. ORS 19.415(3) (2001).

[4] For heavier trucks the number of axles may also affect the amount of the tax; those details are not relevant to the issues in this case.

tax does not pay the fuel tax that the state charges other vehicles and may take any fuel tax paid as a credit against the weight-mile tax. ORS 825.486. A carrier must maintain records of the declared weights of its trucks and the miles that they travel in order to make the required reports and calculate the amount of tax owed.

Plaintiffs do not question the constitutionality of the weight-mile tax itself. Rather, they attack two exceptions to it. The first exception concerns the flat fee options provided in ORS 825.480 for certain commodities. That statute gives carriers of three categories of commodities--logs, sand and gravel carried in dump trucks, and wood chips--the option to choose to pay a flat fee rather than the weight-mile tax. ORS 825.480(1), (4), and (5). For each commodity, the legislature established the fee at an amount that it believed to be identical to what a truck of the same weight carrying that commodity would pay in weight-mile tax if it operated as many miles per year as an average truck that carried that commodity. The calculations are based on the assumption that the truck in question operates entirely in Oregon. The flat fee option is available to carriers who are located in Oregon or any other state. The legislature has adjusted the amounts a number of times in order to reflect changes in the average mileage and in the weight-mileage rates since it originally adopted the flat fee options. If a carrier elects a flat fee option, it must do so for all the trucks in its fleet that carry that commodity, and it may make that election only once per year. ORS 825.480(2). A carrier that chooses to pay a flat fee must still report the mileage that it travels on public highways, OAR 740-055-0120; however, because those reports do not affect the taxes that the carrier pays, the state does not audit them.

Trucks carrying commodities that have a flat fee option are more likely than trucks carrying other commodities to use non-public roads for significant portions of their trips, to use lesser-traveled public roads, and to make multiple short journeys. All of those factors make it more difficult for carriers

to keep the records that the weight-mile tax requires and for the state to enforce the tax. Flat fee carriers also tend to be small operators, for whom record-keeping is especially burdensome. Thus, one purpose of the flat fee option is to ease the burden on both the carriers and the state of administering and enforcing the weight-mile tax.

Although the legislature intended the flat fee options to be revenue neutral, they are not, at least for haulers of logs or of sand and gravel. The best estimates, based on data that are not fully reliable, are that, for the most recent period for which figures were available at the time of trial, wood chip carriers who chose the flat fee option as a group paid $27,315.75 more than they would have paid under the weight-mile tax, while sand and gravel carriers paid $276,535.86 less and log carriers paid $1,164,585.86 less. For sand and gravel carriers, the underpayments are equivalent to 1.34 cents per mile, while for log carriers they are equivalent to 1.9 cents per mile. For purposes of comparison, the average profit margin in the trucking industry is 3 cents per mile.

The above evidence has several implications. The structure of the taxing system makes it probable that carriers that choose the flat fee options will, as a group, pay less than if they paid the weight-mile tax. Only a carrier that expects to save money will choose to pay a flat fee. Although the reduced record-keeping and reporting costs will produce some savings to the carrier, the primary benefit that the options provide is to reduce the total tax bill of a carrier whose trucks operate for more miles than the presumed average that the legislature used to calculate the amount of the flat fee.[5] The fact that very few wood chip carriers chose the flat fee, while

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[5] A carrier who chooses the flat fee must pay the weight-mile tax when its trucks carry commodities that do not qualify under the option that the carrier chose.

many log and sand and gravel carriers did so, supports that point. The few wood chip carriers who chose the option actually paid more on average than they would have under the weight-mile tax; that fact suggests that it is unusual for a truck carrying wood chips to exceed the presumed annual mileage. On the other hand, many carriers who carry the other flat fee commodities chose the flat fee and, overall, experienced substantial savings as a result. The implication is that many trucks carrying those kinds of commodities exceed the presumed annual mileage.

The second exception to the weight-mile tax that is in issue in this case is the exemption for trucks that qualify for registration as farm vehicles. To qualify, a truck must be owned by the owner or renter of a farm that actually produces agricultural products or livestock in sufficient quantities to require the use of a truck. ORS 805.310. The owner can use the truck only for limited purposes that involve hauling the farmer's products or livestock; hauling supplies, equipment, or material to be consumed on the farm; or hauling similar products for another farmer on a bona fide exchange of labor basis. ORS 805.390. A qualified vehicle does not pay the weight-mile tax but instead pays the state's standard fuel tax based on gallons of fuel purchased, which in most circumstances will result in a substantial cost savings to the farmer. Farm vehicles may carry commodities that would otherwise be carried by commercial carriers, who would pay the weight-mile tax. The fuel tax option is available to trucks that are located in Oregon or any other state.

Plaintiffs argue that these statutory exceptions to the weight-mile system for taxing heavy trucks violate the Commerce Clause of the federal constitution, Article I, section 8. That clause authorizes Congress, among other things, to "regulate Commerce * * * among the several States [.]" In *Cooley v. Board of Wardens of Port of Philadelphia et al.*, 53 U.S. (12 How) 299, 13 L.Ed. 996 (1851), the Supreme Court interpreted the Commerce Clause as doing more than author-

izing Congressional action; it also places limitations on a state's ability to regulate or otherwise interfere with interstate commerce even in the absence of legislation. As the Court more recently described it, the Commerce Clause "'by its own force created an area of trade free from interference by the States.'" *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977), quoting *Freeman v. Hewit*, 329 U.S. 249, 252, 67 S.Ct. 274, 91 L.Ed. 265 (1946). That aspect of the Commerce Clause is known as the "dormant Commerce Clause" because the clause limits state action by its very existence. Among other things, the dormant Commerce Clause prohibits a state from taxing interstate commerce in a way that provides a competitive advantage to local businesses. *American Trucking Assns., Inc. v. Scheiner*, 483 U.S. 266, 269, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987).

The issues in this case concern the application of the dormant Commerce Clause to Oregon's taxation of truckers involved in interstate commerce. The United States Supreme Court has used a number of tests over the years to determine when a state tax violates the dormant Commerce Clause, and the tests have not necessarily been consistent. However, since *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), the Court has developed an approach that it continues to use. In *Complete Auto Transit, Inc.*, the Court held that it will sustain

> "a tax against [a] Commerce Clause challenge when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

430 U.S. at 279, 97 S.Ct. 1076. In this case, the issues involve the "fair apportionment" and "nondiscrimination" elements of the test; plaintiffs do not assert that there is no

substantial nexus between their activities and Oregon or that the highway taxes are not fairly related to the services that the state provides. In other words, plaintiffs argue that the exceptions to Oregon's weight-mile tax place interstate commerce at a disadvantage when it competes with intrastate commerce.

In *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 103 S.Ct. 2933, 77 L.Ed.2d 545 (1983), the Court discussed how to determine when a tax is fairly apportioned and when it is nondiscriminatory. Those concepts are closely related. The Court held that "fair apportionment" requires the tax to be both internally and externally consistent. As applied to the state taxation of the income of a unitary business, which was the issue in *Container Corp.*, "internal consistency" means that, if every jurisdiction applied the same tax, no more than all of the business' income would be taxed. 463 U.S. at 169, 103 S.Ct. 2933. In a more recent case the Court described the concept more fully:

> "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. *This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.* A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax."

*Oklahoma Tax Comm'n. v. Jefferson Lines, Inc.*, 514 U.S. 175, 185, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995) (emphasis added).

The internal consistency test thus[] does not look at the actual effect of the tax on interstate commerce but at whether it would, in theory, place interstate commerce at a disadvantage if all states adopted the identical tax. In contrast, "external consistency" means that the factor or factors used in the apportionment formula must actually reflect how income is generated. *Container Corp.*, 463 U.S. at 169-70, 103 S.Ct. 2933. In this case, plaintiffs do not contend that "external consistency" is an issue.

"Fair apportionment" is closely related to "discrimination in effect," if not in intent.[6] "Internal consistency" appears to be the primary test for determining whether a tax discriminates against interstate commerce in its effect. For determining both fair apportionment and discrimination in effect, the issue is whether the tax, if universally applied, would impermissibly interfere with free trade. See *Armco Inc. v. Hardesty*, 467 U.S. 638, 644-45, 104 S.Ct. 2620, 81 L.Ed.2d 540 (1984) (tax that unfairly apportions income from other states is a form of discrimination against interstate commerce). With regard to interstate commerce, the prohibition of discrimination does not require much more than that the test of "fair apportionment" be satisfied. *Container Corp.*, 463 at 170-71, 103 S.Ct. 2933.

Plaintiffs rely heavily on *Scheiner* with regard to the application of the "fair apportionment" and "discrimination in effect" tests to the flat fee and farm truck fuel tax exceptions

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[6] Proof of unconstitutional discrimination does not require proof that the state had a discriminatory purpose. It is sufficient to show that the effect of its actions was discriminatory. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984).

to the weight-rule tax. In that case, the Supreme Court held that two flat fees that the state of Pennsylvania imposed on trucks operating within its borders violated the dormant Commerce Clause. Those fees were, first, a fee of $25 that the state charged between 1980 and 1982 for an identification marker that had to be affixed to every motor carrier vehicle. The state deemed the fee to be part of the registration fees for Pennsylvania-registered vehicles, thus making them exempt from it. In 1982, the state reduced the marker fee to $5, which approximated the cost of administering the marker program. At the same time, it enacted a second flat fee, a tax of $36 per axle for every vehicle that operated more than 2,000 miles in Pennsylvania, and it reduced registration fees for vehicles registered in the state by the amount of the axle tax. As a result, Pennsylvania-registered vehicles paid the same amount before the change as afterwards, but interstate trucking companies had their taxes increased. The lead plaintiff in this case and several trucking companies challenged the Pennsylvania fees as violations of the Commerce Clause.

The decisive question for the Court in *Scheiner* was "do the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce in a way that contradicts the central purpose of the Commerce Clause?" *Scheiner*, 483 U.S. at 282, 107 S.Ct. 2829. In answering that question, the Court found dispositive those cases that made it clear that the Commerce Clause "prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States." *Id.* Pennsylvania's method of taxing failed that standard because it did not treat Pennsylvania-registered vehicles and vehicles from other states consistently. It would undoubtedly deter interstate commerce for every state to impose similar fees for the privilege of making commercial entries into its territory. *Id.* at 284, 107 S.Ct. 2829. In that

situation, a trucker that operated in several states would pay several fees, one to each state, while a trucker that operated solely in Pennsylvania would pay only one fee, to Pennsylvania. Consequently, the taxing scheme had "a forbidden impact on interstate commerce because it exert[ed] an inexorable hydraulic pressure on interstate businesses to ply their trade within the state that enacted the measure rather than 'among the several states.'" *Id.* at 286-87, 107 S.Ct. 2829. For that reason, a state's imposition of an unapportioned flat tax discriminates against interstate commerce. *Id.* at 292, 107 S.Ct. 2829. Flat taxes are constitutionally permissible only "when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user fee schedule would pose genuine administrative burdens." *Id.* at 296, 107 S.Ct. 2829.

As defendants point out, the flat fee options at issue in this case differ from the flat fees in *Scheiner* because they are optional in nature. Carriers who do not choose the flat fee option will pay a weight-mile tax that is properly apportioned and that does not discriminate. In addition, the flat fee option applies only to a limited number of commodities; for that reason alone, most carriers operating in Oregon, both those that operate primarily interstate and those that operate primarily intrastate, pay the weight-mile tax. However, while those facts may limit the discriminatory effect of the flat fees, they do not necessarily make them constitutional. It remains possible that the very act of choosing the flat fee will encourage a carrier to focus on intrastate rather than interstate commerce.

In deciding this kind of issue, the Supreme Court's case law does not rely on the specific evidence in a specific case as the foundation for its conclusions concerning a particular tax. Rather, it focuses on the structure of the tax at issue, something that in this case can readily be perceived by describing hypothetical situations. Here, the focus is on carriers whose trucks travel more miles in Oregon than the

amount that the legislature presumed.[7] As one example, assume that the weight-mile tax for a particular truck is ten cents per mile, that the legislature presumes that the average truck carrying the commodity involved will travel 40,000 miles per year in Oregon, and that the legislature has therefore set an alternative flat fee at $4,000 per year.[8] Carrier A has trucks that actually travel 50,000 miles entirely in Oregon; it elects to pay the flat fee and therefore pays $4,000 per truck, or an effective rate of 8 cents rather than 10 cents per mile. Carrier B has trucks that also operate 50,000 miles, but they operate half the time in Oregon and half the time in other states with identical tax systems. Carrier B would lose money by electing to pay the flat fee in any state that has such a taxing scheme because the flat fee is calculated on an amount of mileage greater than its trucks will travel in any one state. Thus, economic necessity requires carrier B to elect to be taxed on the basis of its mileage, and its total taxes will be $5,000 per truck, or an effective rate of 10 cents per mile. Such a taxing scheme favors intrastate carriers over interstate carriers. Any other hypothetical situation, using any other figures for an unapportioned flat fee option, will show a similar malapportionment and discriminatory effect as to interstate carriers that exceed the presumed average mileage.

In this hypothetical situation, the flat fee option will both exert pressure on the interstate carrier to change its operations to focus on intrastate business and will discriminate

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[7] Because a carrier that expects its trucks to operate in Oregon for fewer than the presumed number of miles has an economic incentive to choose to pay the weight-mile tax, those who choose the flat fee option will usually expect to operate more than the presumed mileage.

[8] The actual tax system involves additional factors. Including them would make that hypothetical more complex but would not affect the conclusions that we draw from it.

against the interstate carrier if it does not do so. Only by focusing on intrastate business can the carrier pay the lower tax rate that similarly situated intrastate carriers are able to pay. The flat fee options, thus, discriminate between interstate and intrastate carriers whose businesses differ only because of their relationship to state boundaries, and the discrimination operates to the detriment of the interstate carrier. The flat fee options do not apportion the tax burden among the states where the interstate carrier operates, and they therefore fail the "internal consistency" test.

Defendants counter that the flat fee is necessary because of the difficulty of administering the weight-mile tax. They argue that carriers of the affected commodities frequently travel off state highways, use less-traveled highways where the costs of enforcing the tax may exceed the amounts received, and make multiple short trips that make record-keeping difficult. However, as plaintiffs point out, many carriers of the same commodities do not choose the flat fee, and the administrative problems that defendants describe also exist as to them. The flat fee option cannot fully resolve those problems, and defendants have not demonstrated that the flat fee options are the only practicable way of collecting the taxes in issue.

The trial court took a different legal approach from what we have described, an approach that defendants endorse. The court relied on the general principles for determining when a state regulation violates the dormant Commerce Clause that the Court described in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970):

> "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

The trial court applied those principles and concluded that there was insufficient evidence to show that the flat fee options had more than an "incidental" effect on interstate commerce. It also held that the system was internally consistent because the evidence showed that out-of-state carriers who paid the flat fees benefited disproportionately to in-state carriers who paid those fees. In addition, it pointed out that flat fee commodities generally travel relatively short, mostly in-state distances and that, as a group, wood chip carriers who chose the flat fee paid more than if they had paid the weight-mile tax.

Our understanding of the applicable case law leads us to the conclusion that the Supreme Court does not apply a *Pike*-type balancing test to the taxation of interstate commerce. Rather, it holds that any malapportionment or discrimination will invalidate the challenged tax. "[W]here simple economic protectionism is effected by state legislation, a stricter rule of invalidity has been erected." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270, 104 S.Ct. 3049, 82 L.Ed.2d 200 (1984). Thus, the Court will base a finding that state legislation constitutes economic protectionism on either a discriminatory intent or a discriminatory effect. *Id.* As we previously discussed, the Court has also made it clear that it is the inherent tendency of a tax, not the effects that the tax has actually produced, that matters for the "internal consistency" test. A tax that fails that test is both malapportioned and discriminatory in effect.

In addition, what matters under the dormant Commerce Clause is not where a carrier is based but where it does business; a Washington carrier that pays a flat fee in Oregon would have the same economic pressure to focus on Oregon intrastate business that exists for an Oregon carrier that chose that option. The Oregon flat fee options provided in ORS 825.480 create a disproportionate pressure that the dormant Commerce Clause forbids. As we have illustrated by our hypothetical example, that exception to the weight-mile tax

necessarily violates the commerce cause because it puts interstate carriers at a disadvantage when compared with intrastate carriers.

Defendants also argue that the flat fee options are a use tax that the state collects to pay for specific services--constructing and maintaining highways--that it provides. As such, they argue, they are not subject to the fair apportionment and anti-discrimination requirements that we have discussed. Defendants rely on *Evansville Airport v. Delta Airlines*, 405 U.S. 707, 716-17, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972), in which the Court upheld a fee of one dollar charged to each airline passenger for the use of the airport. The problem with that argument is that the flat fees involved in *Scheiner* were also designed to pay for Pennsylvania's highways; the Court distinguished *Evansville* on the ground that those fees discriminated against out-of-state vehicles by subjecting them to a much higher charge per in-state mile and did not purport to approximate failure [*sic*] the cost or value of using Pennsylvania's roads. *Scheiner*, 483 U.S. at 290, 107 S.Ct. 2829. In essence, the fees in *Evansville* were self-apportioning and were directly tied to the services provided, while the flat fees at issue in *Scheiner* were not apportioned and thus were not true use taxes. The same is true of the flat fee options at issue in this case. Once a carrier chooses to pay the flat fee, the amount of its taxes is set at a specific amount that is not related to the miles traveled or the services that the state actually provides. While the weight-mile tax may well be a use tax, the flat fee options are not.

Defendants cross-assign error to the trial court's finding that carriers of general commodities and carriers of flat fee commodities are similarly situated for purposes of the dormant Commerce Clause. We do not need to decide that issue. Carriers of flat fee commodities who are not able to take advantage of the flat fee options are sufficiently similarly situated to carriers of those commodities who are able to do so to state a claim under that clause, so the issue does not af-

fect plaintiffs' standing. The parties appear to believe that this issue may affect the remedies on remand; in particular, defendants are concerned that invalidating the flat fee options may lead to invalidating the entire weight-mile tax. In *Bacchus Imports*, for example, the Court invalidated the Hawaii liquor tax because it unconstitutionally exempted certainly locally-produced liquors. However, in *Bacchus Imports*, the exemption was absolute; the liquors in question were not taxed at all. In contrast, the flat fee options in this case are alternatives to the weight-mile tax; invalidating the flat fee options simply means that all carriers are subject to the underlying weight-mile tax. Carriers who carried flat fee commodities and who paid the weight-mile tax rather than a flat fee may be entitled to an appropriate remedy on remand, but the nature of that remedy will not depend on whether the carriers involved competed in the same market with carriers of non-flat fee commodities. Thus deciding the cross-assignments of error will not have a practical effect on the parties' rights on remand.

Next, we turn to the farm truck fuel tax exception in ORS 805.310. Plaintiffs point out that non-farm carriers carry many of the commodities that farmers carry and that farm trucks benefit from paying the fuel tax. They argue that farm trucks are therefore in competition with non-farm carriers and receive discriminatory preferences because the former pay lower taxes. The parties dispute a number of factual issues related to that argument, including whether farm trucks and non-farm carriers compete in the same market. Those disputes are irrelevant to the validity of the tax. As defendant AAA Oregon/Idaho points out, plaintiffs fail to show that the fuel tax discriminates between interstate and intrastate carriers. Under the fuel tax exception for farm trucks, it does not matter where a farm truck is based. To the extent that it does business in Oregon and qualifies as a farm vehicle, it will pay the fuel tax instead of the weight-mile tax. If every state adopted the fuel tax exception, there would be no malappor-

tionment or discrimination between interstate and intrastate carriers. Both kinds of carriers would receive an equivalent economic benefit from the exception.

The dormant Commerce Clause prohibits discrimination between interstate and intrastate commerce; it does not prevent the legislature from providing benefits for certain economic groups if those benefits do not involve such discrimination. The fuel tax satisfies the tests that the Court established in *Complete Auto Transit*. If every state adopted the same tax system, farm vehicles would pay the same taxes whether they operated intrastate or interstate. Thus, the tax is internally consistent, and it is therefore fairly apportioned and does not discriminate in effect. There is also no evidence of a discriminatory intent. The tax applies to an activity with a substantial nexus to Oregon and is fairly related to the services that Oregon provides. We conclude that the fuel tax exception for farm vehicles embodied in ORS 805.310 does not violate the dormant Commerce Clause.

Plaintiffs also argue that the fuel tax exception violates the Equal Protection Clause of the Fourteenth Amendment. The trial court held that there was no equal protection violation because the fuel tax had the legitimate purpose of protecting agriculture. Plaintiffs respond that a state cannot legitimately promote its local economy through a tax system that is designed to favor domestic industry at the expense of industry outside of the state. *See Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985). The problem with that argument is that the fuel tax exception does not discriminate between Oregon and out-of-state farmers. Unlike the higher tax for out-of-state insurance companies that was at issue in *Metropolitan Life Ins. Co.*, the exception favors agriculture in general, not agriculture in Oregon. Because the issue does not involve a protected class, plaintiffs must show that there is no rational relationship between the exception and a legitimate state policy. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58,

108 S.Ct. 2481, 101 L.Ed.2d 399 (1988). The legislature's decision to benefit farmers *when it adopted the fuel tax exception* for farm vehicles was a policy choice for it to make. We see nothing irrational about the means that it chose to achieve its purpose. Thus, we agree with the trial court that the exception does not violate the Equal Protection Clause.

Because of its decision upholding the validity of both provisions, the trial court did not consider the remedies for the violations that we have found. On remand, it shall enter an appropriate declaratory judgment that is consistent with our rulings in this opinion, that resolves all of the parties' contentions, and that awards any appropriate relief.

Reversed and remanded with instructions to enter declaratory judgment declaring the flat fee options unconstitutional, otherwise resolving the parties' contentions, and awarding any appropriate relief; otherwise affirmed.

## APPENDIX C

February 15, 2002

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RE: *ATA et. al. v. State of Oregon et. al. & AAA, Intervenor*

Marion County Circuit Court Case No. OOC-16242

Dear counsel:

As you know, this case was tried before me December 10 through December 20, 2001. Simultaneous written closing arguments were submitted on January 18, 2002. This letter opinion sets forth my findings of fact and conclusions of law.

### FINDINGS OF FACT

I adopt the stipulated findings of fact submitted by the parties on December 10, 2001, as corrected on January 9, 2002. In addition, I make the following findings of fact:

Farm Vehicles

1. No plaintiffs own, rent, or operate farms. (The court draws this inference from the lack of any evidence that plaintiffs do so).

2. When farm vehicles are used other than for the purposes allowed by ORS 805.390, they are not exempt from the weight-mile tax. ORS 825.024(1)(a).

3. Federal law exempts farm vehicles that run less than 7,500 miles from highway use taxes. 26 USC §4483(d)(5).

Competition

4. Generally speaking, it is most cost-effective to haul commodities in vehicles that are specialized for the specific commodity. Hence, logs, sand and gravel, and wood chips are usually each hauled in trucks specifically adapted for those purposes. Likewise, general commodities such as furniture are usually hauled in trucks adapted for that purpose. (Testimony of Jim Bauer, Dennis Williams, and Barry Mammano).

5. Because trucking companies generally do not get paid for empty miles, trucking companies have increased efforts to obtain "back hauls," which are loads the truck can haul back to its original departure point. (Testimony of David Berry, Troy Hutchins, Ron Borges, John Bredeson, and Martin Labbe).

6. The need to procure back hauls has led the trucking industry to place greater emphasis on versatile equipment, which can be used to haul a variety of commodities. Such equipment is being increasingly developed. (Testimony of David Berry, Troy Hutchins, Ron Borges, John Bredeson, and Martin Labbe).

7. While the use of such equipment is generally less cost-effective than the use of specialized equipment, the increased revenue that can be obtained through the increased availability of back hauls with versatile equipment does, at times, make it economically viable to use versatile equipment. Therefore, the practice of using the same vehicle to haul, for example, logs in one direction and plywood in the other direction is increasing. (Testimony of David Berry, Troy Hutchins, Ron Borges, John Bredeson, and Martin Labbe).

8. A survey of Oregon truckers revealed the following:

   a. Approximately 14 percent of respondents who carry general freight truckload also carry flat fee commodities. (Exhibit 552).

   b. Approximately 7 percent of respondents who carry general freight less-than-truckload also haul flat fee commodities. (Exhibit 552).

   c. Approximately 24 percent of respondents who haul other specialized in [*sic*] general commodities also haul flat fee commodities. (Exhibit 552).

   d. Approximately 26 percent of respondents who carry sand and gravel also haul general (non-flat fee) commodities. (Exhibit 552).

   e. Approximately 8 percent of respondents who carry logs also haul general (non-flat fee) commodities. (Exhibit 552).

   f. Approximately 21 percent of respondents who carry wood chips also haul general (non-flat fee) commodities. (Exhibit 552).

   g. Approximately 7.3 percent of respondents haul both flat fee and general (non-flat fee) commodities. (Exhibit 553).

(Testimony of Professor Wilson).

9. If a trucking company sees a profitable opportunity to haul a commodity for which the company does not have the necessary equipment, equipment is readily available to rent or lease. In the alternative, the company could sub-contract with an independent owner-operator who has the necessary equipment. This is a widely used alternative in the trucking industry. (Testimony of David Berry, Lloyd Ludtke, Ron Borges, John Bredeson).

10. There are no regulatory barriers which would prevent a general commodities hauler from hauling flat fee commodities or vice versa. (Testimony of David Berry).

Oregon's Flat Fee Studies,

11. Off-road miles are not taxable. (Testimony of Dr. Casavant).

12. Oregon flat fee taxpayers file monthly reports with ODOT. The reports require the taxpayer to list, for each vehicle, its beginning and ending odometer readings, and its total miles operated. In an additional, separate column, the form asks the taxpayer to list the vehicle's Oregon taxable miles for the month. (Exhibit 80).

13. In 1995, the PUC conducted a flat-fee study, based on data reported in 1993. Believing that its records only contained total miles for flat fee taxpayers, the PUC conducted a survey of flat fee carriers, asking them to estimate their out-of-state and off-road miles. The PUC then applied the percentages of taxable miles obtained from the survey respondents to its overall data from flat fee carriers. The study concluded that wood chip carriers paid $42,761.00 less in flat fee taxes than they would have paid in weight mile taxes;

log carriers paid $141,450.00 more in flat fee taxes than they would have paid under weight-mile; and sand and gravel carriers paid $242,891.00 less in flat fee taxes than they would have paid under weight-mile. (Exhibit 33).

14. In 1997, ODOT assumed responsibility for conducting the flat fee study. The study was initially conducted using the same methodology as the 1995 study, surveying carriers and applying their reported taxable miles to reduce the total miles shown on the flat fee reports. The study used 1995 data. The study concluded that wood chip carriers paid $75,987.00 less in weight-mile taxes than they would have paid in flat fee taxes; log carriers paid $1,703,736.00 less under flat fee than they would have paid underweight-mile; and sand and gravel carriers paid $512,501.00 less under flat fee than they would have paid underweight-mile. (Exhibit 35).

15. At some point, ODOT personnel realized that the forms submitted by flat fee taxpayers actually requested them to report their taxable miles. Therefore, reducing the reported taxable miles based on survey results showing taxable miles as a percentage of total miles was a double reduction. ODOT therefore re-did the 1997 study under the "take the taxpayer at their word" approach, using reported taxable miles without any reduction. However, ODOT recognized that taxable miles were probably not being accurately reported, and stated in its report that this method overestimated the loss to the highway fund. Using this methodology, ODOT found that wood chip carriers had underpaid by $86,714.00 compared to weight mile taxes; log carriers had underpaid by $2,783,281.00 compared to weight mile taxes; and sand and gravel carriers had underpaid by

$596,037.00 as compared to weight mile taxes. (Exhibit 36).

16. Both 1997 studies assumed that log trucks ran 50% of their miles empty. (Exhibit 35, p. 30, Exhibit 36, p.18)

17. Because of continuing concerns as to the accuracy of the methodology used to determine the taxable miles traveled by flat fee taxpayers, the 1997 studies were not presented to the Legislature. (Testimony of Greg Dal Ponte).

18. In 1998, ODOT did an additional study using the "take the taxpayer at their word" methodology, but based on a sample of carriers instead of actual total numbers from carriers. This study used 1997 data. This study found underpayments (as compared to what weight-mile taxes would have been) of $30,130.00 for wood chip carriers; between $3,384,353.00 and $4,025,776.00 for log carriers; and between $822,854.00 and $1,335,358.004 [*sic*] sand and gravel carriers. (Exhibit 38, testimony of Greg Dal Ponte).

19. Flat fee taxpayers complained that the study was inaccurate because flat fee taxpayers consistently over-reported their taxable miles. Mr. Dal Ponte then began reviewing the flat fee reports that came in the mail. He found that most were clearly inaccurate. Many completed only the total miles traveled or the taxable miles, but not both columns, and others completed both columns but put the same number of miles in both columns; indicating that no deduction had been made for off-road or out-of-state miles. (Testimony of Greg Dal Ponte).

20. In response to the concerns of flat fee taxpayers, Mr. Dal Ponte sent a letter to a sample of flat fee taxpay-

ers explaining the difference between total miles and taxable miles, and giving the flat fee taxpayers the opportunity to amend their mileage reports. The letter notified taxpayers that: "Failure to accurately identify and subtract exempt miles from total miles on the Flat Monthly Fee Report could result in an inappropriate increase in your flat fee rate." (Testimony of Mr. Dal Ponte, Exhibit 79).

21. The responses from the carriers indicated that up to 20 percent of miles reported as taxable by log carriers should have been shown as exempt miles; up to 12 percent of miles reported as taxable by wood chip carriers should have been shown as exempt miles; and up to three percent of miles reported as taxable by sand and gravel carriers should have been shown as exempt miles. (Exhibits 41, 78, 62).

22. The 2000 flat fee study again used the "take the carrier at their word" methodology, using the taxable miles reported on the carriers' flat fee reports. This study, based on 1999 data, used a sample of carriers, as opposed to analyzing the data for every carrier (the exception is that all wood chips flat fee reports were analyzed due to their small numbers). The study concluded that wood chip carriers paid $12,853.00 more under the flat fee system than they would have paid under the weight-mile system; log carriers paid between $2,570,433.00 and $3,118,563.00 less under the flat fee system than they would have paid under weight-mile; and sand and gravel carriers paid between $145,476.00 and $469,747.00 less under the flat fee system than they would have paid under weight-mile. (Exhibit 42). Like the 1997 studies, the 2000 study assumed that log trucks ran 50% of their miles empty and 50% loaded. (Exhibit 42, p. 31).

23. ODOT's flat fee studies compared weight-mile taxpayers to flat fee taxpayers. They contained no analysis of whether the taxpayers were in-state or out-of-state. (Exhibits 33, 35, 36, 38, 42).

24. In June of 2001, the Legislature heard testimony that the flat fee studies were unreliable, including a memorandum from ODOT's Executive Deputy Director suggesting that it would be reasonable for the Legislature to make no changes based on the flat fee study. (Exhibits 524, 525, 550).

Revenue Effects of the Flat Fee Option

25. Flat fee taxpayers generally do not keep good records of taxable miles. The difference between taxable and non-taxable miles is irrelevant to them, since it will not affect their tax rate. In addition, most flat fee taxpayers are small operators for whom the recordkeeping required to track taxable and non-taxable miles would be burdensome. (Testimony of Greg Dal Ponte, Barry Mammano, Exhibit 76)

26. Although an administrative rule requires flat fee taxpayers to keep the same records as weight-mile taxpayers, ODOT does not audit flat fee taxpayers or otherwise enforce this recordkeeping requirement, because such efforts would cost ODOT money without raising any additional revenue. (Testimony of Greg Dal Ponte).

27. Despite the trend towards more versatile equipment to facilitate back hauls, it remains the case that very few log haulers have equipment which would permit them to haul logs in one direction and something else on the return trip. Therefore, most log haulers travel the return trip empty most of the time. (Testimony of Dennis Williams, Kenneth Mansigh and Barry Mammano). In addition, log haulers generally run

empty from their homes to the logging site, and from the drop site back home. Haulers often accept a job several hours away from their home, thus running substantial empty miles before beginning the job and after finishing the job, in addition to the empty miles run during the job returning from the drop site back to the logging site. (Testimony of Barry Mammano, Lloyd Ludtke).

28. Because the weight-mile tax is based on the vehicle's weight, log trucks paying under the weight-mile taxes pay a higher rate when fully loaded than when empty. (Testimony of Dr. Casavant).

29. For purposes of comparing taxes paid under the flat fee with what would have been paid under the weight-mile tax, it is reasonable to assume that log trucks run empty 55% of the time. (Testimony of Dr. Casavant).

30. Because log trucks have to travel into the woods, they run a significant percentage of their mileage off-road. Federal tax regulations governing log trucks assume up to 25% of their mileage is off-road. It is reasonable to assume that 15 percent of the total miles run by log trucks are off-road. (Testimony of Dr. Casavant).

31. It is reasonable to assume that up to 3% of miles reported by sand and gravel carriers are non-taxable miles. (Testimony of Dr. Casavant).

32. There exists the possibility that, as a result of information provided by Mr. Dal Ponte and trade industry groups, some flat fee taxpayers may have underreported their number of Oregon taxable miles, in the hope of affecting their future flat fee rates. However, I found no evidence that this has actually occurred, and I consider it unlikely to have occurred to any

meaningful degree, particularly given the uncertainty of any such tax benefit. (Testimony of Dr. Casavant). Given that Dr. Casavant's estimates of off-road and non-taxable miles are conservative in any event, this possibility does not warrant changing those estimates.

33. In calculating the revenue effects of Oregon's flat-fee option, Drs. Casavant and Lawson reviewed the flat fee reports filed by log truckers. Any form that reported a different number for total miles and taxable miles was treated as correct, and it was assumed that all taxable miles reported were actual taxable miles. 44% of the miles were therefore classified as correctly reported. Forms that included the same number for total and taxable miles were treated as incorrectly reported, because of the extreme unlikelihood that a log truck would run 100% of its miles in-state and on-road. The mileage on those forms was multiplied by 85 percent to deduct for the assumption of up to 15 percent off road miles. I find these assumptions reasonable and, if anything, favorable to the plaintiffs since, for example, they consider only off-road and not out-of-state miles for the incorrect mileage reporters, and they consider as correct reports that may have deducted only out-of-state miles from total miles as opposed to also deducting off-road miles (as Mr. Mammano testified he did). (Testimony of Drs. Casavant & Lawson, Barry Mammano).

34. In 1999, wood chip haulers paying flat fee taxes paid $12,873.05 more than they would have paid in the weight-mile taxes. Weight-mile rates were reduced effective September 1, 2000. If the 1999 rates had applied for all of the year 2000, wood chip haulers paying flat fee taxes would have paid $16,337.93 more than they would have paid in weight-mile taxes. If the 2000 rates had applied for all of the year 2000, wood chip haulers paying flat fee taxes would have

paid $49,194.62 more than they would have paid in weight-mile taxes.[1] If one uses a "blended" rate by applying 2/3 of the 1999 rate and 1/3 of the 2000 rate[2], wood chip haulers paying flat fees in 2000 paid $27,315.75 more than they would have paid in weight-mile taxes.[3] (Exhibit 563, testimony of Dr. Lawson).

35. Using 97 percent of reported miles, based on the reasoning described above, sand and gravel trucks paying flat fee taxes in 1999 paid $380,247.82 less than they would have paid in weight-mile taxes. (Exhibit 566, testimony of Dr. Lawson). In 2000, again using 97% of reported miles, and applying 1999 rates for the entire year, sand and gravel truckers paying under the flat fee paid $357,183.67 less than they would have paid under weight-mile taxes. If the 2000 rates were applied for all of year 2000, the underpayment would be $115,803.91. Applying a blended rate, using the same methodology as I did with wood chips, sand and gravel trucks paying flat fee taxes paid $276,535.86 less in 2000 than they would have paid

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[1] This uses the rates "with axles". For trucks over 80,000 pounds, the weight-mile tax rate varies based on the number of axles. Therefore, the comparison that includes axles rates most accurately approximates the weight-mile tax that would have been paid.

[2] As pointed out by Dr. Casavant, this will not result in a precise measure, because of the seasonal nature of these businesses and the timing of the change in rates. Nevertheless, I find it reasonable as a rough approximation of the actual rates in effect in 2000.

[3] I performed these calculations myself using Exhibit 563, Table 4. 66.66% x $266,771.93 (1999 rate) = $177,830.17; 33.33% x $233,915.25 = $77,963.95; total 2000 weight-mile taxes therefore would have been $255,794.12. Flat fee taxes were $283,109.87, the difference is $27,315.75.

in weight-mile taxes.[4] (Exhibit 567, testimony of Dr. Lawson).

36. In 1999, using the assumptions that 44% of miles were correctly reported, and that the remaining miles should be multiplied by 85%, and that log trucks drove 55% empty, flat fee log carriers paid $1,723,476.53 less than they would have paid under weight-mile.[5] (Exhibit 568, testimony of Dr. Lawson).

37. In 2000, again using the same assumptions, if the 1999 rates had applied all year,[6] log carriers paying under the flat fee would have underpaid by $1,505,727.71 compared to weight-mile payers. If the 2000 rates had applied all year, log carriers paying

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[4] 1999 rate w/ axles $1,959,402.55 x 66.66% = $1,306,137.74
2000 rate w/ axles $1,718,022.79 x 33.33% = $572,617.00
Blended rate $1,878,754.74 - $1,602,218.88 = $276,535.86 underpayment (Exhibit 567)

[5] I derived the following figures from Exhibit 568: the total 1999 reported miles for log trucks were 100,327,841. Assuming that 44% of those were correctly reported, 44,144,250 miles should be counted at 100%. Based on my earlier findings regarding over reporting, the remaining 56,183,591 miles should be multiplied by 85%. This results in a figure of 47,756,052.35 which, when added to the 44,144,250 miles correctly reported, results in a total figure of 91,900,302.35 miles. This, in turn, is 91.6% of the reported miles. I then applied the 91.6% to the weight-mile tax figures, using the 45% loaded and 55% empty assumption. This results in a weight-mile tax of $5,874,428.66 on the loaded miles, and $3,057,982.56 on the empty miles. The total weight-mile tax is then $8,932,411.22. Subtracting the actual flat fee taxpayers of $7,208,934.69 results in an underpayment by flat fee log carriers as compared to weight-mile taxes of $1,723,476.53 in 1999.

[6] Calculated same as 1999 calculations[.]

under the flat fee would have underpaid by $484,690.33 compared to weight-mile payers. Using a blended rate, which I find to be the most accurate approximation, in 2000 log carriers paying under the flat fee underpaid by $1,164,585.86 compared to weight-mile payers. (Exhibits 570, 572).[7]

38. I find the assumptions made by Drs. Casavant and Lawson regarding incorrect mileage reporting and

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[7] How I performed these calculations:
total miles reported 94,537,939 x 44% = 41,596,693
remaining miles = 52,941,246 x 85% = 45,000,059
total countable miles = 86,596,752 = 91.6% of reported miles

1999 loaded rates w/axles $5,916,738.31 x 91.6% = $5,419,732.29
1999 empty rates w/axles $3,145,405.23 x 91.6% = $2,881,191.19
Total 1999 w-m rate = $8,300,923.48 - $6,795,195.77 = $1,505,727.71 underpayment

2000 loaded rates w/axles $5,188,698.78 x 91.6% = $4,752,848.08
2000 empty rates w/axles $2,758,775.13 x 91.6% = $2,527,038.02
Total 2000 w-m rate = $7,279,886.10 - $6,795,195.77 = $484,690.33

These match the Exhibit 572 figures

2000 blended rate:
1999 rate $8,300,923.48 x 66.66% = $5,533,395.59
2000 rate $7,279,886.10 x 33.33% = $2,426,386.04
2000 blended w-m rate = $7,959,781.63 - $6,795,195.77 = $1,164,585.86

Plaintiffs' calculation of the blended rate, Exhibit 108, comes out slightly different. In part this appears to be because plaintiffs used 67% for the 1999 rate instead of 66.66%. There are other minor differences that I cannot explain. Plaintiffs calculate a blended rate underpayment of $1,165,400.00.

empty mileage to be more likely correct than those made by the ODOT studies. I therefore find that the figures derived from Drs. Casavant and Lawson's work are a more accurate determination of the true comparison between weight-mile and flat fee taxes than the ODOT studies. In addition, since ODOT has not yet done a study based on year 2000 data (testimony of Greg Dal Ponte), the Casavant/Lawson study is the only [*sic*] that provides data for that important year.

Effects of Flat Fee Tax on Interstate Commerce

39. The trucking industry is highly competitive. Substantial numbers of trucking companies are simply not making it. Nationwide, 3,100 trucking companies failed in 2000, and 2,500 failed in the first six months of 2001. Some companies are making profits of 4-6%. Swift, a large trucking company which pays weight-mile taxes in Oregon, has a profit margin of 5-6%. Bettendorf and Costa, two interstate trucking companies that pay weight-mile taxes in Oregon, have profit margins of approximately 4%. Nationwide, the average profit margin (which presumably reflects the companies that are failing as well as those that are doing better than average) is approximately 2%. This translates to two to three cents per mile as an average profit margin. (Testimony of David Berry, Ron Borges, John Bredeson, and Martin Labbe).

40. The savings to flat fee taxpayers hauling sand and gravel in the year 2000 averaged 1.9 cents per mile. (Exhibit 567).[8]

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[8] Savings of $276,535.86 divided by 14,555,062.43 miles.

41. The savings to flat fee taxpayers hauling logs in the year 2000 averaged 1.34 cents per mile. (Exhibits 569, 570, 572)[9]

42. Some flat fee taxpayers save more than the average amount. Others save less, or even pay more under flat fees than they would pay under weight-mile. (Testimony of Barry Mammano, Dr. Sims, Dr. Casavant, Exhibit 116).

43. Although out-of-state carriers accounted for only approximately 8.5% of miles run by flat fee sand and gravel carriers in 1999, they accounted for 48% of the total underpayment by all sand and gravel flat fee carriers in 1999. (Exhibit 565, testimony of Dr. Lawson). In the year 2000, out-of-state carriers paying flat fee taxes for sand and gravel accounted for 13.33% of the total flat fee sand and gravel mileage, but 31% of the overall underpayment by sand and gravel carriers. (Testimony of Drs. Lawson and Casavant).[10]

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[9] Underpayment $1,164,585.86 divided by 86,596,752 countable miles. Plaintiffs claim, based on their cross exam of Dr. Casavant, that the underpayment is 1.9 cents per mile. Plaintiffs derived this by taking the percentage underpayment calculated in Exhibit 108 (14.6%), and applying this to a blended per-mile rate based on a 80,000 pound truck. Not only does this method come up with a different result than my calculation, but it seems less reliable to me, for the simple reason that not all miles were traveled by 80,000 pound trucks. I believe that my method, dividing the total underpayment by the total countable miles, is the most accurate method of calculating the average actual underpayment.

[10] In response to a question from Mr. Seidman, Dr. Lawson agreed with an approximation of 15% of the mileage. However, according to her testimony, the actual mileage numbers are approximately 2 million miles for out of state sand and gravel carriers and

44. This means that in 1999, out-of-state sand and gravel carriers saved an average of 13.5 cents per mile compared to weight-mile taxpayers, whereas in-state sand and gravel carriers saved an average of 1.4 cents per mile.[11] In 2000, out-of-state sand and gravel carriers saved an average of 4 cents per mile compared to weight-mile taxpayers, and instate sand and gravel carriers saved an average of 1.5 cents per mile.[12]

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13 million for Oregon sand and gravel carriers. 2 million is 13.33% of 15 million.

[11] Here are the calculations: Using 97% of reported miles, total miles =15,952,124. Total underpayment = $380,247.82

Out-of-state carriers: 8.5% of miles =1,355,930.54
48% of savings = $182,518.95
savings per mile (savings ÷ miles) =13.5 cents/mile (maximum rate for heavy trucks in 1999 was 15.10 cents per mile, according to the stipulated facts)

In-state carriers: 91.5% of miles =14,596,193.46
52% of savings = $197,728.87
savings per mile =1.4 cents/mile

(Exhibits 566, 567)

[12] Using Dr. Lawson's testimony that 2,000,000 miles were driven by out-of-state carriers and 13,000,000 miles were traveled by in-state carriers, and that out-of-state carriers received 31% of the savings; and applying these figures to the blended rate savings of $276,535.86 as calculated above, these are the calculations:

Out-of-state carriers: 2,000,000 miles
31% of the savings = $85,726.12
savings per mile (savings ÷ miles) = 4 cents/mile

In-state carriers: 13,000,000 miles
69% of the savings = $190,809.74

45. Using 1999 rates, trucks over 104,000 pounds accounted for 62% of the overall savings by flat fee sand and gravel and payers [*sic*]. Using 2000 rates, trucks over 104,000 pounds accounted for 99% of the overall savings by flat fee sand and gravel and payers [*sic*]. (Exhibit 564, testimony of Dr. Lawson).

46. The commodities eligible to pay flat fee rates in Oregon are commodities that typically would be hauled short distances -- intrastate or regionally. This is because of the relative low value of the commodities and their general availability. A typical log hauling trip would be 60-80 miles, with 35 trips made in a day. A typical general commodity haul would be 2,500-3,000 miles. (Testimony of Martin Labbe, Lloyd Ludtke, Berry Mammano, and Dr. Langenfeld).

47. Plaintiff Mansigh's business is based mostly on long-standing relationships with his customers. Mr. Mansigh has lost no Oregon business to any competitor in the last three years, nor has he lost any business to the one competitor he can think of who uses Oregon's flat fee option. Despite calculations indicating that Mr. Mansigh could reduce his taxes significantly by concentrating his business in Oregon and taking advantage of the flat fee system (Exhibit 101), Mr. Mansigh has not done so. (Testimony of Kenneth Mansigh).

48. Mr. Bredeson was also unaware of losing any business to a competitor who used Oregon's flat fee tax system. (Testimony of Mr. Bredeson).

49. No witnesses testified that they had lost any business to in [*sic*] Oregon competitor using the Oregon flat fee system. No witnesses testified that they had cho-

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savings per mile =1.5 cents/mile

sen to concentrate their trucking business in Oregon in order to take advantage of the flat fee system. No Oregon-based truckers testified that they had avoided out-of-state business in order to increase their in-Oregon miles and maximize their benefit under the flat fee tax system.

50. Mr. Mammano, an Oregon-based log carrier who uses the flat fee tax system, has never turned down a job because it required out-of-state travel. In order to stay in business, Mr. Mammano will haul logs to whatever destination the shipper requests. Mr. Mammano is president of the Oregon Forest Products Trucking Association (OFPTA), an industry association comprised mostly of log carriers. Most OFPTA members pay flat fee taxes. Mr. Mammano is unaware of any OFPTA member turning down a job that required hauling out-of-state, except perhaps where the member was not licensed to operate in the other state. (Testimony of Berry Mammano).

51. In 1999, Idaho changed its system of truck taxation from one in which log trucks were taxed approximately 50% less than general commodities (approximately a 2.5 to 3 cent per mile difference) to one in which trucks pay a weight-based registration tax and a fuel tax. Since the change, Idaho has seen little if any increase in competition for log hauling business and no entry of general commodity haulers into log hauling. (Testimony of Dr. Casavant).

52. If carriers wanted to take advantage of Oregon's flat fee rates, but some of their fleet hauled non-flat fee commodities, they could establish separate fleets or corporate subsidiaries in order to do so. (Testimony of Greg Dal Ponte and Dr. Langenfeld).

53. Swift is a large trucking company that operates throughout the United States and into Canada and

Mexico. Swift has a facility in Oregon with approximately 400 trucks there. Drivers and mechanics for the Oregon facility are recruited locally. Swift does not haul logs in Oregon. (Testimony of David Berry)[.]

54. General commodity carriers such as Swift, who have a significant presence in Oregon, would likely create a division or subsidiary to haul logs in Oregon if the tax structure were favorable enough to make that a profitable business opportunity. The fact that they have not done so suggests that the tax differential is not enough to make logs a profitable business opportunity for them. (Testimony of Dr. Langenfeld, Mr. Labbe).

55. The small size of the tax advantage enjoyed by flat fee taxpayers and the uncertainty of actually achieving a tax benefit by electing the flat fee option (truckers for the most part cannot be certain that they will run enough Oregon taxable miles to obtain a tax benefit under the flat fee option at the time the flat fee election must be made) make it unlikely that the flat fee option changes business decisions of truckers. (Testimony of Dr. Casavant).

Revenue Effect on State if Flat Fees Were Removed

56. Flat fee taxes account for approximately 11 million dollars in annual revenue to the state, whereas weight-mile taxes account for approximately 215 million. (Testimony of Mr. Dal Ponte).

57. Enforcement of the weight-mile tax against carriers who haul flat fee commodities would create a significant cost for the state. More auditors would be needed. In addition, most general commodity carriers travel on major routes such as I-5, where ODOT maintains weigh stations. Flat fee commodity carri-

ers travel extensively on lesser-used state highways and local routes where ODOT does not have weight stations and it could not cost-effectively deploy them. The cost of obtaining a reading at a weigh station on the interstate is approximately 50 cents per vehicle. The cost of obtaining a reading using portable scales is $22.00 per vehicle. (Testimony of Mr. Dal Ponte, Dr. Casavant).

58. The cost of conducting the flat fee studies is in the neighborhood of $10,000.00. (Testimony of Mr. Dal Ponte). The cost of enforcing and auditing the weight-mile tax against flat fee taxpayers could exceed the revenue that would be gained from elimination of the flat fee taxes. (Testimony of Dr. Casavant).

Miscellaneous

59. Mr. Russell testified on behalf of plaintiffs. In his direct testimony, Mr. Russell presented Exhibit 86 as an example of a company which achieved a significant tax savings under Oregon's flat fee system. However, on cross exam it was revealed that the underlying records for this company showed that one truck had traveled 712,602 taxable miles in a year. This would require the truck to have traveled over 81 miles per hour, 24 hours a day and 365 days of the year. Not only is it obvious from that calculation that the mileage listed for this truck was in error, but the computer consultant who provided the data to Mr. Russell gave him a note indicating that the mileage figure for this particular truck was at least 10 if not 100 times too high. Mr. Russell was unable to provide any convincing explanation as to why he used this carrier as an example despite the obvious error in the data, and the warning from his own consultant. I can only conclude that, at best, Mr. Russell demon-

strated a reckless disregard for the accuracy of the information he presented to the court, and, at worst, he deliberately attempted to deceive the court. Either conclusion is sufficient for me to find his testimony unreliable, and I therefore disregard Mr. Russell's testimony in its entirety. (Testimony of Mr. Russell, Exhibits 86, 544, 545).

## CONCLUSIONS OF LAW

Plaintiffs allege that the farm truck exemption and the flat fee taxes violate both the Commerce Clause and the Equal Protection Clause.

## I. COMMERCE CLAUSE ANALYSIS

Before a claim can be made that a tax is discriminatory under the Interstate Commerce Clause, the entities who are taxed differently must be "similarly situated." *General Motors Corp. v. Tracy*, 519 US 278, 298, 299,117 S Ct 811, 824 (1997). Therefore, I first consider defendants' arguments that plaintiffs are not similarly situated with flat fee and farm carriers.

### A. FARMERS ARE NOT SIMILARLY SITUATED WITH TRUCKERS FOR COMMERCE CLAUSE PURPOSES

While the plaintiffs argue that *any* actual or prospective competition between the entities in dispute is sufficient to consider them similarly situated under the Commerce Clause, *GM v. Tracy* expressly holds to the contrary. The court in *GM* recognized that there was some potential competition between sellers of bundled and unbundled natural gas. *Id.*, 519 US at 303, 117 S Ct at 826. Nevertheless, the court held that these entities should not be considered similarly situated for Commerce Clause purposes. *Id.*, 519 US at 310, 117 S Ct at 829.

Neither *GM* nor *Alaska v. Arctic Maid*[13], the other case addressing the "similarly situated" issue, sets forth a test for determining whether entities are similarly situated for Commerce Clause purposes. In *Alaska*, the court focused on the different functions performed by the entities - the out-of-state freezer ships did not freeze fish to sell frozen, but rather to preserve the fish for transport to canneries. Thus, the freezer ships competed not with local dealers who retailed frozen fish, but with local canners. *Id.*, 366 US at 204, 81 S Ct at 932. In *GM*, the court gave weight to the limited competition between the entities and also the state's interest in protecting the small residential consumers served by the local distribution companies. *GM*, *supra*, 519 US at 303-310, 117 S Ct at 826-829.

On the facts of this case, I find that farmers and truckers are not similarly situated for Commerce Clause purposes. The exemption to the weight-mile tax is granted to entities which own or operate farms, and only for farm-related purposes. If a vehicle otherwise eligible for the exemption is used to haul non-eligible commodities, the vehicle must pay weight-mile tax for those miles. No plaintiffs own or operate farms. No plaintiffs grow or sell crops. While trucking is 100% of plaintiffs' business, there was no evidence that trucking was anything more than a small part of the business of farmers. While both farmers and truckers can haul non-eligible commodities, they both must pay weight-mile tax when they do so, and thus are treated the same.

Companies whose main business was selling fish were found not to be similarly situated in *Alaska v. Arctic Maid*. Companies which supplied natural gas were found to be not similarly situated in *GM*. Here, farmers and truckers are engaged in much more different businesses, with the only overlap being the transportation of the farmers' products. This is

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[13] *Alaska v. Arctic Maid*, 366 US 199, 81 S Ct 929 (1961)[.]

a marginal level of competition consistent with that found to be insufficient to outweigh other concerns in *GM*. And, like in *GM*, there are important state interests at stake, namely, protection of agriculture. Indeed, protection of agriculture has been recognized by Congress as important, and farm vehicles are substantially exempted from federal highway taxes.

## B. PLAINTIFFS ARE SIMILARLY SITUATED WITH FLAT-FEE TAXPAYERS

Defendants argue that plaintiffs are not similarly situated with flat fee taxpayers; that is, carriers who are eligible to pay their taxes on a flat fee basis because they haul wood chips, sand and gravel, or logs. The first problem with defendants' argument is that it does not dispose of all plaintiffs. Plaintiff Kenneth E. Mansigh Trucking, Inc., is a Washington-based log carrier who is without question similarly situated to flat fee taxpayers in that he hauls the commodities eligible for flat fee treatment.

Again applying the principles of *Alaska v. Arctic Maid* and *GM*, I conclude that haulers of flat fee commodities and general commodities are similarly situated for Commerce Clause purposes. I agree with defendants that the overlap between these markets is small. By and large, most log haulers haul logs and most general commodity haulers haul general commodities. Nevertheless, the evidence does show an increasing trend for carriers to diversify. There are no regulatory barriers to prevent a carrier from carrying both general commodities and flat fee commodities. Equipment is increasingly designed to be versatile so that it can handle different types of commodities. Economic pressures are pushing carriers to diversify their business. A survey of Oregon carriers by the state's expert showed significant overlap between flat fee and general commodities carriers. On this record, I find enough actual and prospective competition to determine that carriers of flat fee commodities are similarly situated to carriers of general commodities.

## C. BASIC STANDARD FOR COMMERCE CLAUSE ANALYSIS OF TAX PROVISIONS

A tax will survive a commerce clause challenge "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." *Complete Auto Transit, Inc.[] v. Brady*, 430 US 274, 279, 97 S Ct 1076, 1079 (1977); see also *Amerada Hess v. Director of Taxation of New Jersey*, 490 US 66, 72, 109 S Ct 1617, 1621 (1989). Plaintiffs' arguments focus on discrimination against interstate commerce and apportionment. Plaintiffs do not contend that the flat fee options are facially discriminatory, nor could they, since both in-state and out-of-[s]tate carriers can and do use the flat fee options. Eligibility for the flat fee tax rates is determined solely by the commodities hauled, not the location of the carriers.

## D. OREGON'S TRUCK TAX SYSTEM DOES NOT INTENTIONALLY DISCRIMINATE AGAINST OUT-OF-STATE CARRIERS

Plaintiffs' weakest argument is that the availability of a flat fee option intentionally discriminates against interstate commerce. See *Bacchus Imports v. Dias*, 468 US 263, 104 S Ct 3049 (1984) (exemption from excise tax for locally-produced liquor found to be unconstitutional discrimination against interstate commerce where legislature expressly stated the purpose of the exemption was to aid local industry).

Certainly there is no direct evidence of intentional discrimination in this case. There was no evidence of any statement by any legislator at any time of an intent to advantage Oregon trucking companies compared to interstate trucking companies by making the flat fee tax available.

Plaintiffs argue that a discriminatory intent should be inferred because the legislature, despite having studies indicating a discriminatory effect, failed to correct the situation. This argument is unpersuasive for several reasons. First, the 1997 study which plaintiffs contend shows a discriminatory effect was never even presented to the legislature due to disputes as to its validity. Second, the 1999 Legislature did not ignore the studies, but rather reduced the weight-mile tax by approximately 12% (see Statement of Stipulated Facts). Third, the studies presented to the legislature analyzed the difference between flat fee and weight-mile taxpayers. There was no evidence that those studies contained any analysis of in-state versus out-of-state carriers.

In 2001, the legislature heard testimony that the flat fee studies were unreliable and that the legislature would be justified in not changing rates based on those studies. Plaintiffs argue that the hearing at which this testimony was presented was a sham orchestrated for purposes of this lawsuit, but if that is the case, there is no evidence that any legislators were involved in or aware of the "sham" nature of the hearing. There was no evidence to indicate that the legislators did not rely on the testimony received at this hearing in good faith. Moreover, the results of Dr. Casavant and Lawson's studies indicate that the testimony heard by the legislature was correct. Projecting forward from the change in the weight-mile rate that went into effect in September of 2000, if that rate were applied to all of the log truck miles in 2000[14], the underpayment for logs is reduced to $484,690.33. Divided by the 86,596,752 miles traveled, this results in an average underpayment of 6/10 of a cent per mile. In other words, the effect of the rate changes that went into effect in September 2000 could not have been fully understood at the time the legislature met in 2001. Thus, the legislature's failure to

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[14] [U]sing the assumptions described above, and using 2000 mileage because 2001 was unavailable[.]

change rates in 2001 can hardly lead to an inference of discriminatory intent.

Finally, approximately 88% of Oregon-based trucking companies pay the weight-mile taxes which plaintiffs contend are disadvantageous. If indeed Oregon's legislators were motivated by a discriminatory intent to aid Oregon trucking companies, there is no explanation for why they would do so by disadvantaging 88% of Oregon trucking companies.

## E. OREGON'S FLAT FEE TAXES DO NOT DISCRIMINATE IN PRACTICAL EFFECT AGAINST INTERSTATE COMMERCE

Is well-established that even a tax which is facially nondiscriminatory and unmotivated by discriminatory intent may still violate the Commerce Clause if it "has the effect of unduly burdening interstate commerce." *Amerada Hess*, *supra*, 490 US at 75, 109 S Ct 1617 at 1623.

### *1. Standard for Practical Effect Discrimination*

Plaintiffs have argued that any effect on interstate commerce is prohibited by the Commerce Clause, and that the court has no authority to weigh the impact on interstate commerce against the purpose of the regulation. However, the cases relied on by plaintiffs for this proposition are all cases involving intentionally or facially discriminatory taxes. In *Bacchus*, *supra*, the legislature expressly stated its intent to assist local industry. *Associated Industries of Missouri v. Lohman*, also cited by plaintiffs, involved a facially discriminatory tax imposed only on goods which were purchased out of the state and brought into the state. *Associated Industries of Missouri v. Lohman*, 511 US 641, 114 S Ct 1815; see 511 US at 647, 114 S Ct at 1820, 1821 (1994). Similarly, *Maryland v. Louisiana* involved a facially discriminatory tax that imposed a "first use" tax on gas piped into the state, but then exempted gas which was to be actually used in the state as

opposed to shipped on to interstate destinations. *Maryland v. Louisiana*, 451 US 725, 757,101 S Ct 2114, 2134 (1981). And *Fulton Corp. v. Faulkner* involved a facially discriminatory tax in which residents paid no tax on their holdings in corporations that did business entirely with the state, but paid the full tax rate for their holdings in corporations that did business entirely outside the state. *Fulton Corp. v. Faulkner*, 516 US 325, 328, 116 S Ct 848, 852 (1996).

In contrast, cases discussing taxes which do not intentionally or facially discriminate against interstate commerce appear to apply a more flexible standard. The standard was set forth in *Pike v. Church* [*sic*]:

> Although the criteria for determining the validity of state statutes affecting interstate commerce have been variously stated, the general rule that emerges can be phrased as follows: Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. [citation omitted].
>
> *Pike v. Church* [*sic*], 397 US 137, 142, 90 S. Ct. 844, 847 (1970)

While the composition and philosophy of the Supreme Court has undoubtedly changed since the *Pike* decision, *Pike* has not been overruled and it is logically distinguishable from cases concerning facially or intentionally discriminatory statutes. Moreover, it was cited with approval in the 1994 case *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, specifically with regard to its holding that nondiscriminatory regulations which have incidental effects on interstate commerce are valid unless "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Oregon Waste Systems, Inc. v. Depart-*

*ment of Environmental Quality*, 511 US 93, 99, 114 S Ct 1345, 1350 (1994), quoting *Pike*, *supra*. In *Oregon Waste Systems*, the statute involved was facially discriminatory. It imposed a surcharge on disposal of solid waste generated out-of-state which did not apply to solid waste generated in-state. The court expressly identified that facial discrimination as the reason it did not apply the *Pike* balancing test in that case. *Id.*, 511 US at 100, 101, 114 S Ct at 1351.

I therefore conclude that plaintiffs must prove more than any effect whatsoever on interstate commerce. They must prove an "undue burden" on interstate commerce. *Amerada Hess*, *supra*. If the effects on interstate commerce are incidental, then under the *Pike* test, plaintiffs must prove that the burden on interstate commerce is clearly excessive in relation to the putative local benefits.

2. *The Effect of Oregon's Flat Fee Tax on Interstate Commerce Is Incidental and Not Excessive in Relation to Local Benefits from the Tax*

The gist of plaintiffs' argument regarding discrimination is as follows: the flat fee taxpayers are mostly Oregon-based; flat fee taxpayers pay a lower rate than weight-mile taxpayers; therefore, Oregon-based taxpayers enjoy a tax break compared to out-of-state carriers.

With regard to wood chip carriers who pay under the flat fee, the evidence is clear that they pay a higher rate than the weight-mile taxpayers. Therefore, the flat fee tax disadvantages, if anyone, in-state commerce rather than interstate commerce.

With regard to sand and gravel carriers and log carriers, I have found that they did enjoy a slightly lower average tax rate than weight-mile carriers. In the year 2000, I found that sand and gravel carriers on average paid 1.9 cents per mile less than they would have paid under the weight-mile tax,

and log carriers paid on average 1.34 cents per mile less than they would have paid under the weight-mile tax. I cannot agree with defendants that these differences are "revenue neutral" in light of the average profit margin in the industry being three cents per mile.

On the other hand, plaintiffs exaggerate the difference, arguing that some flat fee taxpayers save considerably more than the average. This is true, but plaintiffs fail to mention that the evidence also shows that some flat fee taxpayers actually pay more than they would pay under the weight-mile tax.

Moreover, the delineation between in-state and out-of-state taxpayers is not as simple as plaintiffs would have it. While it is true that most flat fee taxpayers are Oregon-based and most out-of-state carriers pay weight-mile tax, it is also true that 88% of Oregon carriers pay weight-mile tax. In *Goldberg v. Sweet*, the court found it significant in rejecting an argument that an Illinois tax on phone calls discriminated against interstate commerce that the burden fell heavily on Illinois taxpayers who presumably could participate in the Illinois political process. The court noted that "[i]t is not a purpose of the Commerce Clause to protect state residents from their own state taxes." *Goldberg v. Sweet*, 488 US 252, 266,109 S Ct 582, 591 (1989).[15] Here, if indeed the flat fee

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[15] On this issue as well plaintiffs cite a case involving a facially discriminatory statute. Plaintiffs cite *New Enemy Co. of Indiana v. Limbach* for the proposition that it does not matter if out-of-state businesses do not suffer and in-state businesses do. However, the statute in *New Energy Company* was a facially discriminatory statute that granted a tax credit to ethanol produced in Ohio or in a state that granted a reciprocal credit to Ohio-produced ethanol, Indeed, the portion of the opinion cited by plaintiffs begins with: "where discrimination is patent." *New Energy Co. of Indiana v. Limbach*, 486 US 269, 276, 108 S Ct 1803, 1809. In this case, discrimination is not "patent". The statute does not on its face favor

alternative disadvantaged weight-mile taxpayers, one would assume that the 88% of Oregon carriers who pay weight-mile tax would have some impact on the political process. Not only that, but some out-of-state carriers pay the flat fee tax. Indeed, as will be discussed shortly, out-of-state carriers derive a substantially disproportionate benefit from the sand and gravel flat fee option. When it comes right down to it, plaintiffs have presented *no* evidence of the difference, if any, between the actual taxes paid by in-state and out-of-state carriers. They have simply attempted to use the difference between weight-mile and flat fee payers as a proxy for out-of-state and in-state carriers.

The ultimate question is whether the tax structure in any way disadvantages interstate commerce. I cannot find that it does.

With regard to sand and gravel, I find it highly significant that out-of-state taxpayers enjoy a vastly disproportionate share of the tax benefit. In 1999, out-of-state taxpayers saved an average of 13.5 cents per mile using the flat tax, whereas in-state taxpayers only saved an average of 1.4 cents per mile. In 2000, out-of-state taxpayers save an average of 4 cents per mile, whereas in-state taxpayers only saved an average of 1.5 cents per mile. In the face of those figures, it is very difficult to conclude that out-of-state trucking companies have been damaged by the availability of the flat fee option.

Moreover, evidence that would indicate that interstate commerce has been damaged was completely lacking. There was no evidence of a single out-of-state carrier losing a single customer to a carrier taking advantage of the flat fee rates. Indeed, Mr. Mansigh, while speculating that he was at

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in-state interests, nor is there any evidence of the discriminatory intent behind the statute.

a hypothetical competitive disadvantage, testified that he had not lost a single Oregon customer in the last three years to anyone. There was no evidence of a single out-of-state carrier establishing a fleet or subsidiary in Oregon to take advantage of the flat fee rates. Even out-of-state carriers who already had a significant presence in Oregon, such as Swift, made no effort to establish a fleet or subsidiary to take advantage of flat-fee rates. Despite plaintiffs' chart indicating that Mansigh could save significant money by concentrating its operations in Oregon to take advantage of the flat fee taxes, there was no indication that Mansigh had made any effort to do so or intended to. Likewise, there was no evidence of a single in-state carrier refusing to take a load out-of-state in order to concentrate its miles in Oregon.

In addition, the evidence showed that in Idaho, where a substantially greater disparity in tax rates between commodities similar to Oregon's flat fee commodities and general commodities was eliminated, the trucking market has not changed.

Rather, the evidence indicated that several factors were significantly more important to where trucking companies operate than Oregon's tax structure. First, the evidence was clear that truckers will go where the business is. Second, at least for smaller companies like Mansigh, much of that business is developed through long-term personal relationships, having nothing to with tax rates. Third, the evidence was also unanimous that commodities like logs and sand and gravel will virtually always be hauled for short distances only, because it is not economically viable to haul them long distances. Thus, these commodities will be carried for the most part by in-state haulers regardless of the tax structure.

The court in *Amerada* noted that:

> Denying a deduction for windfall profit tax payments cannot create oil reserves where none exist and therefore cannot be considered an incentive for

> oil producers to move their oil-producing activities to New Jersey.
>
> *Amerada*, *supra*, 490 US at 78,109 S Ct at 1617.

Similarly, a change in Oregon's tax structure would not change the facts that most of Mr. Mansigh's long-standing customers are in Washington, and most of Mr. Mammano's are in Oregon. Nor would it change the fact that each of these truckers is more than willing to travel to the other state when they have business there.

Considering the record as a whole, I cannot find that the availability of the flat fee option for certain commodities creates an undue burden on interstate commerce. If there is any effect at all from the small rate difference, it is incidental. Applying the *Pike* test, it is clear that, regardless of any benefit to taxpayers, the flat fee option creates a significant benefit to the state. Removing the flat fee option would impose significant additional costs on the state in order to enforce a universal weight-mile tax. Additional auditors would be needed, and additional data, in the form of weigh stations placed on remote, lightly-traveled roads, would also be needed. Any incidental effect which might be created by the tax structure is outweighed by the state's interest in efficient and cost-effective tax enforcement, particularly considering the flat fee revenue only amounts to approximately 5% of the revenue collected by the state from weight-mile taxpayers.

## F. OREGON'S TRUCK TAX SYSTEM IS FAIRLY APPORTIONED

Determining whether Oregon's truck tax system is fairly apportioned poses an interesting problem. It is established that a flat tax is unapportioned. *ATA v. Scheiner*, 483 US 266, 284, 107 S Ct 2829, 2840 (1987). It is equally established that a tax based on the number of miles traveled by a truck, such as the weight-mile tax, is properly apportioned. *Goldberg*, *supra*, 488 US at 264, 109 S Ct at 590. This case

presents the question of whether a tax system that permits some taxpayers, whether based in-state or out-of-state, to voluntarily choose to pay an unapportioned flat tax, while permitting all taxpayers to pay an apportioned tax if they prefer, violates the Commerce Clause.

Simply on the face of the question, I am inclined to say no. It seems that the evil of the flat tax in *Scheiner* was that any trucker traveling through the state was forced to pay the unapportioned tax. It is difficult to conceptualize how a tax system which permits every taxpayer to choose to pay an apportioned tax could violate the apportionment requirement.

Nevertheless, I will analyze the apportionment issue using the traditional method: asking whether the tax is internally consistent and externally consistent. *Goldberg*, *supra*, 488 US at 261, 109 S Ct at 589; see also *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 US 175, 185, 115 S Ct 1331, 1338 (1995).

*1. Oregon's Truck Tax System Is Internally Consistent*

"To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result." *Goldberg*, *supra*, 488 US at 261, 109 S Ct at 589. A more expansive version of the test was set forward in *Oklahoma Tax Commission*: "Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Oklahoma Tax Commission*, *supra*, 514 US at 185, 115 S Ct at 1338.

First, there is no risk of multiple taxation if every state were to adopt a truck tax system like Oregon's. Nothing in either Oregon's weight-mile tax or its flat fee tax reaches mileage run in another state.

Second, there is no burden on interstate commerce that intrastate commerce would not also bear. As discussed in detail above, with regard to wood chips, the flat fee taxpayers actually pay a higher tax. With regard to sand and gravel, interstate trucking companies receive a disproportionate share of the tax savings. Overall, some interstate carriers receive an advantage from the flat fee taxes, the vast majority of Oregon's carriers pay the supposedly disadvantageous weight-mile tax, and some Oregon carriers paying flat fee taxes pay more than they would pay under the weight-mile formula. Finally, as discussed in my analysis of whether the tax structure has a discriminatory effect, I have simply seen no evidence that interstate commerce has been disadvantaged or negatively affected by Oregon's truck tax system. Nor have I seen any indication of truckers concentrating their mileage in Oregon in order to take advantage of the flat fee rates.

Moreover, as discussed above, plaintiffs' own evidence demonstrates that the flat fee commodities will always be mostly hauled by in-state carriers, regardless of the tax structure, because it is not economically feasible to haul them long distances. The proposition that, but for Oregon's flat fee system, interstate truckers would be hauling logs across the nation simply does not comport with the facts of this case.

*2. Discussion of Plaintiffs Internal Consistency Analysis*

Plaintiffs argue that Oregon's system fails the internal consistency test because if every state employed an identical system, a sand and gravel carrier would achieve significant tax savings by concentrating its mileage in Oregon instead of operating in interstate commerce. However, the data regarding sand and gravel carriers interestingly shows that the greatest tax savings was *not* achieved by the group who ran the most miles in Oregon. Indeed, in 1999, while running

only 8.5 percent of the sand and gravel miles, out-of-state carriers saved nearly ten times as much per mile as the in-state carriers who ran the vast majority of the miles. In 2000, out-of-state carriers running 31 percent of the sand and gravel miles saved nearly three times as much per mile as in-state carriers who ran the majority of the miles. At least with respect to sand and gravel, it appears that the key to maximizing savings under the flat fee system is to run a heavy truck, not to run a large number of miles in Oregon.

If we were to apply plaintiffs' argument to a log truck, it clearly overestimates what the weight-mile tax would be (and therefore the disparity, if any, between the truck running all its miles in Oregon compared to the truck running its miles interstate), because it assumes that all weight-mile taxes are paid at the 80,000 pound rate. This means that the log truck would have to run loaded for all miles, when in fact the evidence is that log trucks run 55% of their miles empty and therefore pay a lower weight-mile rate for those miles.

Finally, even if an 80,000 pound truck could be affected as plaintiffs allege, the effect on interstate commerce cannot be determined by analyzing only one truck or class of trucks. In order to determine the net effect on interstate commerce, one must analyze how the tax works overall, taking into account its various different effects.

*3. Discussion of Cases Cited by Plaintiffs*

Plaintiffs rely heavily on two cases for their argument that Oregon's truck tax system fails the internal consistency test.

The first of these is *Scheiner*, *supra*. I do not find *Scheiner* persuasive in this case. First, it is clear that it was of great importance in *Scheiner* that there was no alternative to the flat tax. Indeed, the court stated: "If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that

commerce among the States would be deterred." *Scheiner*, *supra*, 483 US at 284, 107 S Ct at 2840. In this case, Oregon does not require a flat fee as the price of entry into the state. Any trucker can choose to pay the weight-mile tax instead.

In addition, in *Scheiner*, the flat fee resulted in out-of-state trucks paying a per-mile tax rate approximately five times as heavy as that paid by in-state businesses. The court found this difference "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.*, 483 US at 286, 287,107 S Ct 2841, 2842. Here, the difference between weight-mile and flat fee taxpayers is approximately 15%, not 500%. Moreover, as discussed above, the difference between weight-mile and flat fee taxpayers does not indicate the difference between in-state and out-of-state taxpayers. Furthermore, there is simply no evidence that Oregon's truck tax system exerts a "hydraulic pressure" on truckers to ply their trade in Oregon as opposed to in interstate commerce.

Finally, even *Scheiner* recognized that a flat tax could still be permissible where it was the only practicable means of collecting revenues and "the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." *Id.*, 483 US at 296, 107 S Ct 2847. In this case, I cannot say that the flat tax is the *only* practicable means of collecting revenues, since Oregon does collect weight-mile taxes from haulers who would be eligible for flat fee but elect weight-mile. But I do not read *Scheiner* to prohibit a flat tax *alternative* when the existence of that alternative results in substantial cost savings to the state and its elimination would pose genuine administrative burdens.

An additional case which plaintiffs contend it is "on all fours" with this case is *ATA v. Gray*. In that case, Arkansas offered truckers three options: an annual flat fee, a mileage fee of five cents per mile, or a trip permit. The evidence was

that out-of-state trucks paid 370% more than in-state trucks. *ATA v. Gray*, 288 Ark 488, 494, 707 SW2d 759, 761. The Arkansas Supreme Court upheld the tax against Commerce Clause challenges. *Id.* The merits of the case never reached the U.S. Supreme Court. However, one justice, ruling on an application for an injunction, concluded that the plaintiffs were likely to prevail in their contention that the tax was unconstitutional. Noting that the out-of-state taxpayers paid a rate more than three times higher than instate taxpayers, the Justice ruling on the injunction stated that the effect of the tax was substantially similar to that in *Scheiner*. *ATA v. Gray*, 483 US 1306, 1308, 108 S Ct 2, 3 (1987).

First, the opinion of one Justice ruling on a motion for preliminary injunction does not constitute a binding Supreme Court precedent regarding the merits of the case. Second, the evidence in *Gray*, like the evidence in *Scheiner*, showed out-of-state taxpayers paying several times more than in-state taxpayers. As discussed in my analysis of the *Scheiner* case, those facts present an entirely different scenario than the evidence in this case.

For all these reasons, I find that Oregon's truck tax system passes the internal consistency test.

*4. Oregon's Truck Tax System Is Externally Consistent*

"The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Goldberg*, *supra*, 488 US at 262,109 S Ct at 589.

Here, I do not understand plaintiffs to have made any contention that Oregon's system somehow taxes out-of-state activity. I can see no evidence that it does, and therefore find that Oregon's truck tax system is externally consistent.

Because I find that Oregon's truck tax system is both internally and externally consistent, I find that it is properly apportioned. I have found that Oregon's truck tax system passes the *Complete Auto* test, and therefore I turn my attention to plaintiffs' equal protection argument.

## II. OREGON'S TRUCK TAX SYSTEM DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

### A. THE FARM EXEMPTION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE

Because this case does not involve a fundamental right or a suspect class, the tax will "survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Public Schools*, 487 US 450, 457, 458, 108 S Ct 2481, 2487 (1988). Protection of agriculture is a legitimate governmental purpose; one which is promoted by [the] federal government in addition to Oregon's exemption for farm trucks. The exemption for farm trucks is rationally related to that purpose.

### B. OREGON'S FLAT FEE TAXES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE

First, the *Complete Auto* test under the commerce clause encompasses due process standards. *Amerada Hess*, *supra*, 490 US at 79, 80, 109 S Ct at 1625. Having found that Oregon's flat fee taxes do not violate the Commerce Clause under the *Complete Auto* test, I also find that they do not violate equal protection. *Id.*

Moreover, I find that the flat fee taxes are rationally related to a legitimate government purpose. As discussed above, the flat fee taxes save Oregon substantial administrative costs which would be imposed if they were removed.

That is a sufficient basis for an economic regulation to pass an equal protection challenge.

## CONCLUSION

Plaintiffs raised issues which, as a matter of public policy, certainly concern this court. My conclusion is based on the specific facts that were proven at trial. Changes in the flat fee or the weight-mile rates could result in a different situation, leaving open the unfortunate possibility that Oregon's tax structure will need to be litigated again in the future. Moreover, the lack of accurate recordkeeping by the flat fee taxpayers will continue to make analysis of the true impact of the flat fee tax a complicated endeavor. Nevertheless, my obligation is to decide this case based on the facts before me and the law, not on my personal view of what would make good public policy. The plaintiffs have the burden of proof, and I have been unable to find sufficient evidence in the record to justify finding Oregon's truck tax system unconstitutional. Defendants should submit an appropriate judgment.

Once again I thank all counsel for their professional and diligent work on this case.

Sincerely,

Claudia M. Burton
Circuit Court Judge Pro Tem

(3)

Supreme Court, U.S.
FILED
JUN 5 - 2006
OFFICE OF THE CLERK

No. 05-1177

IN THE

# Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*,

*Petitioners*,

v.

STATE OF OREGON, DEPARTMENT OF TRANSPORTATION, *ET AL.*,

*Respondents*.

**On Petition for a Writ of Certiorari to the Supreme Court of Oregon**

## BRIEF OF AAA OREGON/IDAHO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether optional flat fee alternatives provided by the State of Oregon for trucks carrying specific commodities cause Oregon's heavy truck tax system to violate the dormant Commerce Clause of the United States Constitution when the State uses a weight-mile tax as its default tax.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the Supreme Court of Oregon were petitioners American Trucking Associations, Inc.; CRST, Inc.; USF Reddaway, Inc.; Kenneth E. Mansigh Trucking, Inc.; Veneer Chip Transport, Inc; and respondents State of Oregon, Department of Transportation; Grace Crunican, in her capacity as Director of the Oregon Department of Transportation; and AAA Oregon/Idaho.

Respondent AAA Oregon/Idaho has no parent Corporation, and there is no publicly held company owning 10% or more of its stock.

## TABLE OF CONTENTS

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ..... ii

TABLE OF AUTHORITIES CITED ..... iv

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 1

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING THE PETITION ..... 6

A. The Oregon Supreme Court's ruling poses no conflict with rulings by other courts or this Court. ... 6

B. The Court's decision in the Michigan case removes any supposed doubt about the need to prove actual discrimination in effect. ..... 9

C. The ATA failed to prove actual discrimination ..... 12

D. This case presents no fair apportionment issue ..... 14

CONCLUSION ..... 15

## TABLE OF AUTHORITIES CITED

**Cases**

*American Trucking Ass'ns, Inc. v. Michigan Public Serv. Comm'n*, 545 U.S. 429, 125 S. Ct. 2419 (2005) ..... 2, 11, 12

*American Trucking Ass'ns, Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993) ..... 7

*American Trucking Ass'ns, Inc. v. State*, 556 N.W.2d 761 (Wis. Ct. App. 1996) ..... 8

*American Trucking Associations, Inc.v. Scheiner*, 483 U.S. 266 (1987) ..... 1, 2, 9, 11, 12

*Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) ..... 11

*Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977) ..... 11

*Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) ..... 10

*Commonwealth v. American Trucking Ass'ns, Inc.*, 746 S.W.2d 65 (Ky. 1988) ..... 8

*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) ..... 2

*Container Corp. of America v Franchise Tax Bd.*, 463 U.S. 159 (1983) ..... 13

*Goldberg v. Sweet*, 488 U.S. 252 (1989) ..... 2, 14, 15

*Missouri v. Lohman*, 511 U.S. 641 (1984) ..... 2

*Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175 (1995) ..... 2, 14, 15

*Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93 (1994) ..... 10

*Raymond Motor Co. v. Rice*, 431 U.S. 429 (1978) ..... 14

*Trailer Marine Transport Corp. v. Vasquez*, 997 F.2d 1 (1st Cir. 1992) ..... 7, 9

*Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) ..... 14

**Statutes**

Oregon Revised Statutes:

ORS § 425.474 ..... 1

ORS § 425.480(1) ..... 3

ORS § 425.480(4) ..... 3

ORS § 425.480(5) ..... 3

ORS § 825.474(2) ..... 2

ORS § 825.476 ..... 1

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Besides the provisions noted by petitioners, Section 825.474 of the Oregon Revised Statutes provides in pertinent part:

> 1. In addition to other fees and taxes imposed by law upon carriers, there shall be assessed against and collected from every carrier a tax for the use of the highways to apply to the cost of administration of this chapter and for the maintenance, operation, construction and reconstruction of public highways.
>
> 2. The tax rate which shall apply to each motor vehicle shall be based upon the declared combined weight of the motor vehicle and in accordance with the weight group tax rates shown in the tables set forth in ORS 825.476.
>
> * * *

The carrier tax tables that applied for the period January 1 through August 31, 2000, and the revised carrier tax tables that applied for the period September 1 through December 31, 2000, as set forth in Section 825.476 of the Oregon Revised Statutes, are provided in the attached Appendix B. App., *infra*, 1b-2b.

## STATEMENT OF THE CASE

American Trucking Associations, Inc. (the "ATA") contends that this case involves a flat tax that, "in its pernicious effects," is just like the mandatory flat taxes the Court struck down in *American Trucking Associations, Inc. v. Scheiner*, 483 U.S. 266 (1987). Pet. at 2. The Oregon Supreme Court correctly recognized that this situation is nothing like the one in *Scheiner*.

Faithfully applying the Court's fair apportionment precedents from *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) through *Goldberg v. Sweet*, 488 U.S. 252 (1989) and *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175 (1995), the Oregon Supreme Court drew the inescapable conclusion that Oregon does not tax more than its fair share of interstate commerce. Unlike the entry fees Pennsylvania imposed on interstate carriers in *Scheiner*, Oregon's optional flat fees do not erect a barrier at the State's borders. If all states followed Oregon's tax system, carriers would not be required to pay multiple entry fees for the privilege of operating in interstate commerce but instead would pay only for miles actually traveled in each state.

The Oregon Supreme Court also correctly applied the Court's discrimination precedents from *Associated Industries of Missouri v. Lohman*, 511 U.S. 641 (1984), through *Scheiner* and *American Trucking Ass'ns, Inc. v. Michigan Public Serv. Comm'n*, 545 U.S. 429, 125 S. Ct. 2419 (2005) in ruling that discrimination against interstate commerce is not presumed but instead must be proven in real dollars and cents. Not only did the ATA fail to prove that interstate carriers paid more per mile than Oregon haulers or otherwise suffered any practical burden as a result of the flat-fee option, but the record showed just the opposite. App., 18a-22a. The Oregon Supreme Court's straightforward and unremarkable application of the Court's Commerce Clause jurisprudence presents no occasion for further review.

1. Oregon generally taxes heavy trucks for their use of the State's highways through a weight-mile tax by which a carrier pays a rate for each mile that its trucks operate on the State's public highways. The rate is based on the vehicle's maximum legal weight. ORS § 825.474(2); App., 4a. The higher the declared weight, the higher the per mile tax. ORS § 885.476; App., 4a, *infra*, 1b-2b. Carriers must maintain records of each vehicle's declared weight and

miles traveled on public roads to calculate and correctly report taxes owed. App., 4a.

Oregon offers carriers of logs, sand and gravel, and wood chips the option to pay a flat fee in lieu of the weight-mile tax. ORS § 425.480(1), (4) and (5); App, 4a-5a. For each commodity, the legislature aims for revenue neutrality between the flat fee and the weight-mile tax. That is, the legislature sets the flat-fee amount prospectively to collect the identical revenue that a truck of the same weight would pay in weight-mile tax if it operated as many miles per year as the average truck carrying that commodity. App., 5a. The legislature has adjusted the relationship between the flat fee and the weight-mile tax a number of times, by changing the flat fee amount, the weight-mile rates, or both, to reflect changes in the average mileage since Oregon's adoption of the flat-fee options in 1949. Both Oregon and non-Oregon based carriers have elected to pay the optional flat fees. App., 5a.

2. Trucks carrying flat-fee eligible commodities are more likely than trucks carrying other commodities to use nonpublic (i.e., nontaxable) roads for significant portions of their trips, to use lesser-traveled public roads where the State does not have permanent weigh stations, and to make multiple short journeys. These factors make it more difficult for the carriers to keep the records that the weight-mile tax requires and for the State to enforce the tax. The purpose of the flat-fee option is to ease the burden on both the carriers and the State of administering and enforcing the highway use tax. App., 5a-6a. The cost to the State of doing away with the flat-fee options and enforcing and collecting the weight-mile tax against flat-fee taxpayers could exceed any additional revenue the State might gain in those years when flat-fee taxpayers underpay compared with what their tax liability would have been under the weight-mile tax. App., 58a–59a.

3. For the tax year 2000 at issue in the case, the ATA "presented *no* evidence of the difference, if any, between the actual taxes paid by in-state and out-of-state carriers." App., 69a (emphasis original). The only evidence the ATA even attempted to offer on point was the expert testimony of Robert Russell, who used one Oregon carrier as a purportedly representative example of a company that had achieved significant tax savings under the flat fee. The data for this company was grossly in error, and Mr. Russell had been warned by his computer consultant not to use it. The trial court concluded that Mr. Russell, at best, demonstrated a reckless disregard for the accuracy of his data and, at worst, deliberately attempted to mislead the court. The trial court therefore disregarded his testimony in its entirety. App., 59a–60a.

The only probative evidence was thus defendants' expert testimony. Using conservative assumptions that favored the ATA's position, defense experts Drs. Ken Casavant and Catherine Lawson showed that during 2000 flat-fee paying wood chip haulers overpaid by $27,315.75, while sand and gravel trucks electing the flat fee underpaid by $276,535.86 and flat-fee paying log carriers underpaid by $1,164,585.86. This means that, at best for the ATA, flat-fee haulers in some instances paid anywhere from 85% to 100% of what they would have paid under the weight-mile tax and in other instances paid more. App., 49a–52a.

While the majority of carriers electing the flat-fee options were Oregon-based, this fact alone does not determine whether in-state or out-of-state truckers bore the burden of any overpayment or enjoyed the benefit of any underpayment. Simply electing the flat-fee option in a year where there is an underpayment does not guarantee a tax savings to any individual carrier or in any particular amount. Because a carrier has to run more miles than the average to achieve tax savings, some flat-fee taxpayers save more than

the average, some save less, and some pay more than they would have paid under the weight-mile tax. *Id.*, 54a. Indeed, although out-of-state sand and gravel carriers represented only 3.5% of flat-fee electors and accounted for only 13.33% of the total flat-fee sand and gravel mileage, they realized 31% of the sand and gravel underpayment in 2000. *Id.* This means that out-of-state sand and gravel carriers electing the flat fee saved more than in-state carriers. *Id.* at 55a. The figures were similar for 1999, except out-of-state sand and gravel haulers saved even more than their in-state counterparts. *Id.*

4. The ATA also failed to prove any significant practical burden on interstate commerce. App., 22a. There was no evidence that any trucker, whether in-state or out-of-state, ever took the flat fee into account in deciding whether to haul, or avoid hauling, any commodity, whether flat-fee eligible or not, in Oregon or across Oregon's borders. There was no evidence that any out-of-state carrier has been harmed at all in competing for in-state hauls in Oregon or interstate hauls running through Oregon. There was no evidence that any carrier ran more miles or fewer miles in Oregon because of the flat fee. App., 56a-58a. The evidence was all to the contrary. Neither in-state nor out-of-state carriers consider the flat fee in deciding whether or where to haul commodities of any kind, whether flat-fee eligible or not. *Id.*, 56a-57a. Truckers go where the business is; they travel where the shipper requests. *Id.* In particular, flat-fee eligible carriers have developed their business through longstanding relationships that they would not risk by declining a job. *Id.*, 56a-57a, 70a-71a.

Moreover, roughly 88% of Oregon haulers pay the same weight-mile tax that the truckers represented by the ATA pay and would have the ability to seek a legislative solution if the flat-fee options presented any problem. *Id.*, 68a-69a. There is no such problem. Over the years, flat-fee

studies conducted by the State have shown that the flat-fee rates have done a good job of approximating weight-mile rates, marginally overcharging flat-fee payers in the aggregate through 1995. (SER 19.) Without complaint for over 50 years until the ATA brought this case, the flat fees served their valid purpose of providing a revenue-neutral alternative to the weight-mile tax that significantly reduces the administrative burdens on both the taxpayers and the State. App., 58a-59a.

## REASONS FOR DENYING THE PETITION

### *A. The Oregon Supreme Court's ruling poses no conflict with rulings by other courts or this Court.*

The ATA seeks to entice the Court into granting this petition by manufacturing a conflict among the lower courts. The ATA says that the Oregon Supreme Court's holding that discrimination must be proven in real dollars and cents somehow conflicts with rulings by other state supreme courts and federal courts of appeal. There is no such conflict.

First, the ATA's cases are all distinguishable because they involved mandatory flat taxes that imposed entry fees at the state's borders for all participants. The complaining out-of-state parties all paid the same flat fees as their in-state counterparts for the privilege of operating in the state.

Oregon requires no one to pay a flat fee for the privilege of running on its public roads. No carrier represented by the ATA pays the flat fee. They are all weight-mile taxpayers who pay only for actual miles driven on Oregon public roads. This distinction makes a difference. This case does not present the same contrast that existed in *Scheiner* between in-state and out-of-state carriers. There, the carriers all were required to pay the same fee for the nominally identical privilege of driving as many miles as they wanted on the state's roads, but the privilege was likely to be more valuable to in-state carriers. Here, there is no

reason to assume that out-of-state carriers electing a flat fee that is calibrated to the default weight-mile tax are likely to receive less value from their election than in-state carriers.

Second, the ATA mischaracterizes the state and federal holdings on which it relies. None of those cases has held that a party who is not required to pay, and does not pay, an optional flat fee is entitled to a presumption of discrimination.

The two cases the ATA discusses, *Trailer Marine Transport Corp. v. Vasquez*, 997 F.2d 1 (1st Cir. 1992), and *American Trucking Ass'ns, Inc. v. Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), certainly did not so rule. In *Trailer Marine Transport*, Puerto Rico imposed a $35 per year flat fee on truck trailers to fund a compulsory no-fault compensation plan for accident victims. The court analyzed the evidence to conclude that transient trailers paid 5 or 6 times as much per accident as permanent trailers. 977 F.2d at 10. This was virtually identical to the situation in *Scheiner*, where out-of-state truckers paid five times the tax rate as their Pennsylvania-based counterparts. The *Trailer Marine* Court acknowledged that "[d]eciding under the Commerce Clause precedents whether discrimination exists is heavily dependent upon the facts." *Id.* at 10. *ATA v. Secretary of Administration* similarly relied on actual evidence of discrimination to strike down Massachusetts' flat fees on transporting hazardous waste. 613 N.E.2d at 99, 102 (evidence included the State's concession that some interstate carriers paid the fees for all vehicles even though some vehicles never crossed the border at all and that some interstate vehicles carried hazardous waste only one time in Massachusetts but still had to pay the

annual fee, making the privilege more valuable to intrastate transporters).[1]

Third, none of the cases cited by the ATA presented situations where the only probative evidence showed just the opposite of what the ATA asks the Court to presume about Oregon's tax system. Here, the only evidence on point showed that out-of-state carriers fared better than their in-state counterparts. Wood chip carriers electing the flat fee paid higher per mile rates on average than did weight-mile taxpayers, while interstate sand and gravel carriers electing the flat fee saved more than 9.6 times per mile what their in-state counterparts saved in 1999 and roughly 2.67 times per mile what their in-state counterparts saved in 2000. App., 55a, 74a. As the trial court further found, the structure of Oregon's flat fees makes it unlikely they would affect carrier behavior. *Id.*, 58a.

Fourth, all of the ATA's cases were decided before the Court's decision in the *Michigan Public Serv. Comm'n* case last year. That decision leaves no doubt that discrimination must be proved in real dollars and cents and may not simply be presumed.

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[1] The ATA's other string cites pose no such conflict either as those cases also involved evidence of actual discrimination, *see, e.g. Commonwealth v. American Trucking Ass'ns, Inc.*, 746 S.W.2d 65, 67 (Ky. 1988) (where mandatory flat fees imposed a cost per mile between 1.5 cents and $150 for someone traveling under 10,000 and only .5 cents per mile or less for trucks traveling 40,000 miles or more and where evidence showed that out-of-state carriers invariably traveled far fewer than 10,000 miles on average and far fewer miles on average than Kentucky-based carriers, Kentucky flat fee, enacted as a retaliatory tax to the Pennsylvania fees struck down in *Scheiner*, held unconstitutional), or they were decided on other grounds, *see, e.g. American Trucking Ass'ns, Inc. v. State*, 556 N.W.2d 761, 765 (Wis. Ct. App. 1996) (court declares hazardous waste flat fees unconstitutional under the fair apportionment test and does no discrimination analysis).

*B. The Court's decision in the Michigan case removes any supposed doubt about the need to prove actual discrimination in effect.*

The cases cited by the ATA recognize that "whether discrimination exists is heavily dependent upon the facts," to use the words of the *Trailer Marine Transport* court. 977 F.2d at 10. However, to the extent there was any argument about the need to prove an actual discriminatory effect, the *Michigan* decision removed all possible doubt.

As the ATA and *amicus* The Chamber of Commerce assert here, the ATA argued in the *Michigan* case that it did "not need empirically to demonstrate the existence of a burdensome or discriminatory impact upon interstate trucking" caused by a $100 flat fee Michigan imposed on trucks engaged in point-to-point deliveries within the State. Rather, the ATA said that *Scheiner* "requires invalidation of the $100 flat fee, even in the absence of such proof." 125 S. Ct. at 2424-25. The Court disagreed, noting that the ATA proved in *Scheiner* that Pennsylvania's flat marker fee and flat axle tax fell five times more heavily on interstate trucks than local trucks. *Id.* at 2425. The Court concluded about the Michigan tax, "We lack convincing evidence showing that the tax deters, or for that matter discriminates against, interstate activities." *Id.* The same is true here.

The ATA and the Chamber of Commerce attempt to cabin the *Michigan* holding by arguing distinctions between Michigan's mandatory flat fee and Oregon's optional flat taxes. Chiefly, they say that Michigan's flat fee differs in that it taxes only local activity because it applies solely to point-to-point deliveries within the State. Of course, Oregon taxes only miles traveled within its borders. Neither the ATA nor the Chamber cites to any evidence in the record showing that Oregon's flat fees in practice regulary tax anything other than point-to-point deliveries in Oregon, such as by an out-of-state trucker picking up sand and gravel

somewhere in Oregon and delivering it someplace else in the State. The evidence was that these markets call for local activity because of the nature of the commodities involved. Log hauling trips, for example, typically run from 60 to 80 miles to allow truckers to run 3 to 5 trips per day from the logging site to the mill. App., 56a.

Putting aside the ATA's evidentiary problems, there is a bigger flaw in arguing this distinction. The ATA and the Chamber offer no doctrinal basis relating to the purposes of the dormant Commerce Clause for why the Court should require actual proof of discrimination in the case of Michigan's mandatory flat fee but presume discrimination in the case of Oregon's elective flat fee option. Certainly, dormant Commerce Clause analysis applies to the Michigan tax, which, while it attaches only to the local portion of a truck haul, nevertheless affects interstate commerce, as in instances where interstate carriers top off their loads with intrastate pickups and deliveries. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981). Had Michigan imposed a facially higher flat fee on out-of-state trucks, that would violate the Commerce Clause, regardless of the purely local nature of the tax. *See, e.g., Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99-100 (1994). Had the ATA shown empirically that Michigan's $100 fee significantly discourages interstate carriers from topping off or otherwise significantly deters interstate trade, the tax would have been unconstitutional as well. 125 S. Ct. at 2424. Contrary to the ATA's and the Chamber's suggestion, it seems far more likely as an intuitive matter that Michigan's universally applied $100 flat fee would fall more heavily on interstate carriers and therefore discourage them from "topping off" than that Oregon's optional flat fee, which is calibrated to collect what the average weight-mile taxpayer hauling each commodity pays, would discourage any trucker from hauling any commodity into, out of or through Oregon.

The empirical evidence in this case was all contrary to the ATA's proposed presumption of discrimination. Nothing about Oregon's optional flat fees offends core Commerce Clause principles. The fees do not interfere with the creation of a national trade area free from interference from the states, nor do they cause balkanization of the trucking market. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 328 (1977). Neither in-state nor out-of-state carriers consider the flat fee options in deciding whether to cross Oregon's borders. App., 56a-58a. Because carriers are required only to pay the weight-mile tax, the flat fees do not enforce an entry fee or otherwise erect a barrier around Oregon to keep Oregon goods in or interstate competitors out. *See Scheiner*, 483 U.S. at 284. Nor have the more than 50 years the flat fees have been in effect seen any retaliatory legislation enacted by other states, for the obvious reason that there is nothing to retaliate against. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521-522 (1935).

The ATA and the Chamber also attempt to distinguish the Michigan tax by arguing that its purpose of defraying regulatory costs differs from Oregon's purpose of maintaining its highway system. However, an Oregon optional flat fee calibrated to the average number of miles run by haulers of specific commodities seems every bit as likely to be fair as a Michigan mandatory flat fee based on the average costs of regulating vehicular size and weight, of administering insurance requirements, and of applying safety standards. 125 S. Ct. at 2424.

Perhaps nothing undermines the asserted distinctions between *Michigan* and this case more than the fact that the Court relied on *Scheiner* to support the holding in *Michigan*. It would be difficult to find a flat tax that seems more obviously discriminatory than the border fees Pennsylvania imposed in *Scheiner*, particularly in light of the facts that the

fees bore no relationship to the services provided by the State and that the legislature enacted a simultaneous credit that effectively eliminated the axle fees for Pennsylvania-based carriers. 483 U.S. at 290. Yet, this Court found the tax discriminatory based on data showing that the fees imposed five times the burden on interstate trucks, *id.* at 286, and used that precedent to justify requiring proof of an actual discriminatory effect in the *Michigan* case. 125 S. Ct at 2425. If *Scheiner* left any doubt as to the quantum of proof needed to show discrimination, the *Michigan* decision has resolved that doubt.

*C. The ATA failed to prove actual discrimination.*

The ATA says that, even without a presumption of discrimination, it proved that the flat fees caused a discriminatory effect. Such invitations to review the well-supported factual findings of a trial court, as affirmed by the State's highest court on review, present no occasion to grant *certiorari*. The ATA's assertion seems all the more odd considering its only evidence of discrimination was presented through a witness whose testimony was rejected in its entirety because he was either reckless about the truth or deliberately lied to the trial court. App., 59a-60a.

Nothing about the trial court's conclusion, "When it comes right down to it, plaintiffs have presented *no* evidence of the difference, if any, between the actual taxes paid by in-state and out-of-state carriers," App., 69a, requires review by this Court. Nor is there any reason for the Court to review the trial court's conclusion that "evidence that would indicate that interstate commerce has been damaged was completely lacking."[2] In particular, there was no evidence showing that

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[2] While the Chamber of Commerce purports to worry that the small average underpayment found for log haulers and sand and gravel carriers might be important when the average profit per trucking mile is 3 cents, that worry is misplaced. First, there was no evidence showing that this

the flat fees encouraged truckers to concentrate their miles in Oregon or to avoid Oregon. *Id.*, 69a-71a.

The Oregon Supreme Court's opinion in this case did nothing more than require a Commerce Clause plaintiff to prove actual discrimination. Suggestions by the ATA and the Chamber that Oregon has somehow cleverly figured out a way to sidestep *Scheiner* and engage in undetected, purposeful discrimination cannot stand in light of the uncontroverted finding that the flat fees are designed to be revenue neutral as between weight-mile and flat fee payers – and those two categories are not even the same as out-of-state and in-state haulers.[3]

The ATA's arguments about discrimination offend two principles of federalism that have long animated this Court's Commerce Clause jurisprudence. The first is that states are given great leeway to enact tax systems; a plaintiff must show through clear and cogent evidence that a tax violates the Commerce Clause to prevail on such a claim. *Container Corp. of America v Franchise Tax Bd.*, 463 U.S. 159, 170 (1983). The second is that, when local

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was a benefit enjoyed by in-state carriers. Second, whatever the average profit margin might be for long-haul trucks, there was no evidence as to what log or sand and gravel carriers earn per mile. It would seem nearly impossible that the figure could be 3 cents. Because log trucks travel an average of roughly 45,000 miles per year (ER 16), that would make the average profit margin roughly $1,400. The profit would be worse for sand and gravel carriers, who average roughly 32,000 miles per year (*id.*) and would therefore earn less than $1,000 per year.

[3] The suggestion that this case provides a blueprint for other states to dodge *Scheiner* is far-fetched. Oregon's optional flat fees have been in effect in the same form since 1949, yet remain unique so far as we are aware. If Pennsylvania tried to change its flat axle fee as suggested by the Chamber, that would not make the tax constitutional if it caused out-of-state truckers to pay 500 percent more than in-state truckers any more than Oregon's tax would be constitutional had the ATA shown such an effect here.

parties pay the same tax as out-of-staters, as is the case here where the overwhelming majority of Oregon truckers pay the weight-mile tax, courts should be wary of striking down the tax when the State's own political processes would be expected to act as a check on any undue burden. *See Raymond Motor Co. v. Rice*, 431 U.S. 429, 447 (1978).

*D. This case presents no fair apportionment issue.*

In a final push to obtain review, the ATA urges that a tax system requiring trucks to pay a perfectly apportioned weight-mile tax, *see, Goldberg v. Sweet*, 488 U.S. at 264 (mileage-based taxes are by definition fairly apportioned), is somehow unfairly apportioned because the State offers a limited group of carriers especially burdened by record keeping to elect to be treated as an average hauler. This is equivalent to suggesting that state income taxes that allow taxpayers to elect the standard deduction instead of itemizing are unfairly apportioned and must violate the Commerce Clause. The ATA misunderstands fair apportionment.

As the Court said in *Jefferson Lines*, 514 U.S. at 184-85, fair apportionment is the "lineal descendant" of the prohibition against multiple taxation announced in *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). Fair apportionment uses the internal and external consistency tests to measure whether "each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 261. The internal consistency test asks whether, if all states enacted a tax identical to the challenged tax, multiple taxation would result. *Id.* The external consistency test asks whether the State has limited itself to taxing the in-state component of an interstate activity or instead has taxed extraterritorial values. *Id.* at 262.

The ATA does not contend that Oregon's tax violates the external consistency test. But the ATA misapplies the internal consistency test to argue that Oregon's tax violates this requirement. Boiled to its essence, the ATA argues that,

if it can hypothesize a fictional interstate trucker who might pay higher taxes than a fictional intrastate hauler, this violates fair apportionment.

The ATA is wrong. If every state duplicated Oregon's system, truckers would not be exposed to the risk of multiple taxation any more than purchasers of bus tickets were threatened with multiple taxation in *Jefferson Lines*. If every state had the same system as Oregon's, interstate truckers would be required to pay only for actual miles driven in each state. That is by definition fairly apportioned. *See Goldberg*, 488 U.S. at 264.

The ATA's real complaint is not that Oregon's system threatens interstate truckers with multiple taxation, but rather that some flat fee carriers were undertaxed in 2000 and that this benefit purportedly went to in-state carriers. Fair apportionment addresses problems of overtaxation that arise when a state seeks to tax more than its fair share of an interstate transaction. This creates a threat that a state that has a rightful claim to the share wrongly taken by the overreaching state will claim its fair share, resulting in double taxation that may smother interstate commerce. Fair apportionment does not address issues of undertaxation that may arise when a state does not collect everything it can from local commerce. Rather, this Court's discrimination precedents resolve issues raised by undertaxation of local commerce. This case thus presents no fair apportionment issue. Nor, as we have shown, does it present any genuine discrimination issue.

## CONCLUSION

The Oregon Supreme Court properly rejected the ATA's invitation to ignore the evidence and indulge in a presumption of discrimination that the evidence contradicted. Instead, the court faithfully followed this Court's Commerce Clause discrimination and fair apportionment precedents to uphold a mileage-based tax that, for administrative savings

to both the taxpayers and the State, allows a small group of carriers to elect to be treated as average haulers. The petition for *certiorari* should be denied.

Respectfully submitted.

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# APPENDIX

## Appendix B

## 825.476 Carrier tax tables

MILEAGE TAX RATE TABLE "A"
January 1 through August 31, 2000

| Declared Combined Weight Groups (Pounds) | | Fee Rates Per Mile (Mills) |
|---|---|---|
| 26,001 | to 28,000 | 41.5 |
| 28,001 | to 30,000 | 44.0 |
| 30,001 | to 32,000 | 46.0 |
| 32,001 | to 34,000 | 48.0 |
| 34,001 | to 36,000 | 50.0 |
| 36,001 | to 38,000 | 52.5 |
| 38,001 | to 40,000 | 54.5 |
| 40,001 | to 42,000 | 56.5 |
| 42,001 | to 44,000 | 58.5 |
| 44,001 | to 46,000 | 60.5 |
| 46,001 | to 48,000 | 62.5 |
| 48,001 | to 50,000 | 64.5 |
| 50,001 | to 52,000 | 67.0 |
| 52,001 | to 54,000 | 69.5 |
| 54,001 | to 56,000 | 72.0 |
| 56,001 | to 58,000 | 75.0 |
| 58,001 | to 60,000 | 48.5 |
| 60,001 | to 62,000 | 82.5 |
| 62,001 | to 64,000 | 87.0 |
| 64,001 | to 66,000 | 92.0 |
| 66,001 | to 68,000 | 98.5 |
| 68,001 | to 70,000 | 105.5 |
| 70,001 | to 72,000 | 112.5 |
| 72,001 | to 74,000 | 119.0 |
| 74,001 | to 76,000 | 125.0 |
| 76,001 | to 78,000 | 131.0 |
| 78,001 | to 80,000 | 136.5 |

MILEAGE TAX RATE TABLE "A"

September 1 through December 31, 2000

| Declared Combined Weight Groups (Pounds) | | Fee Rates Per Mile (Mills) |
|---|---|---|
| 26,001 | to 28,000 | 36.4 |
| 28,001 | to 30,000 | 38.6 |
| 30,001 | to 32,000 | 40.3 |
| 32,001 | to 34,000 | 42.1 |
| 34,001 | to 36,000 | 43.8 |
| 36,001 | to 38,000 | 46.0 |
| 38,001 | to 40,000 | 47.8 |
| 40,001 | to 42,000 | 49.5 |
| 42,001 | to 44,000 | 51.3 |
| 44,001 | to 46,000 | 53.0 |
| 46,001 | to 48,000 | 54.8 |
| 48,001 | to 50,000 | 56.6 |
| 50,001 | to 52,000 | 58.7 |
| 52,001 | to 54,000 | 60.9 |
| 54,001 | to 56,000 | 63.1 |
| 56,001 | to 58,000 | 65.8 |
| 58,001 | to 60,000 | 68.8 |
| 60,001 | to 62,000 | 72.3 |
| 62,001 | to 64,000 | 76.3 |
| 64,001 | to 66,000 | 80.7 |
| 66,001 | to 68,000 | 86.4 |
| 68,001 | to 70,000 | 92.5 |
| 70,001 | to 72,000 | 98.6 |
| 72,001 | to 74,000 | 104.3 |
| 74,001 | to 76,000 | 109.6 |
| 76,001 | to 78,000 | 114.9 |
| 78,001 | to 80,000 | 119.7 |

(6)

Supreme Court U.S.
FILED
JUN 2 - 2006
OFFICE OF THE CLERK

No. 05-1177

# In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, Inc., et al,

Petitioners,

v.

OREGON DEPARTMENT OF TRANSPORTATION, et al,

Respondents.

Petition for Writ of Certiorari to the Oregon Supreme Court

## BRIEF FOR RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Oregon generally assesses a weight-mile tax on trucks using the State's highways. In certain circumstances, Oregon also allows truckers the option to pay a flat fee, in lieu of the weight-mile tax. The flat fees are designed and intended to be "revenue-neutral," as compared to the weight-mile tax. Does Oregon offend the dormant Commerce Clause by allowing truckers to pay these optional flat fees?[1]

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[1] Petitioners' statement of the "question presented" incorrectly asserts that Oregon has "imposed" the challenged flat fees on interstate commerce.

## PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Oregon were petitioners American Trucking Associations, Inc.; CRST, Inc.; USF Reddaway Inc.; Kenneth E. Mansigh Trucking, Inc.; Veneer Chip Transport, Inc.; and respondents State of Oregon, Department of Transportation; Grace Crunican, in her capacity as Director of the Oregon Department of Transportation (Matthew Garrett is now the Director); and AAA Oregon/Idaho.

## TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

PARTIES TO THE PROCEEDING ..... ii

STATEMENT OF THE CASE ..... 1

REASONS FOR DENYING REVIEW ..... 4

I. No case of this Court or of any other court supports petitioners' claim of "structural discrimination" based solely on the "flat" character of the challenged fees, or their corollary claim that in these circumstances they should have been relieved of the requirement to prove discrimination. ..... 5

II. The Oregon Supreme Court's consideration of the evidence was sound and unremarkable. ..... 8

III. The challenged tax raises no issues of "internal consistency." ..... 12

IV. The challenged tax appears to be unique. ..... 15

CONCLUSION ..... 16

## TABLE OF AUTHORITIES

Page

### Cases Cited

*Amerada Hess Corp. v. N.J. Taxation Div.*,
490 U.S. 66 (1989) ..... 11

*American Trucking Ass'ns, Inc. v. State of Oregon*,
124 P.3d 1210, 339 Or. 554 (2005) ..... 4, 11

*American Trucking Ass'ns, Inc. v. State of Oregon*,
90 P.3d 15, 193 Or. App. 185 (2004) ..... 4

*American Trucking Assn's, Inc. v. Scheiner*,
483 U.S. 266 (1987) ..... 5, 6, 7, 9, 10, 12, 13

*American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*,
545 U.S. 429, 125 S. Ct. 2419 (2005) ..... 7, 8, 14, 15

*Associated Indus. of Missouri v. Lohman*,
511 U.S. 641 (1995) ..... 9

*Bacchus Imports, Ltd. v. Dias*,
468 U.S. 263 (1984) ..... 9

*Camps Newfound/Owatonna, Inc. v. Harrison*,
520 U.S. 564 (1997) ..... 9

*Container Corp. of America v. Franchise Tax Board*,
463 U.S. 159 (1983) ..... 11, 14

*Fulton Corp. v. Faulkner*,
516 U.S. 325 (1996) ..... 9

*Goldberg v. Sweet*,
488 U.S. 252 (1989) ..... 13

*Nippert v. City of Richmond*,
327 U.S. 416 (1946) ..... 6

*Oklahoma Tax Comm. v. Jefferson Lines, Inc.*,
514 U.S. 175 (1995) ..... 14

**Constitutional and Statutory Provisions**

Or. Laws 1947, ch. 467, § 17 ..... 1

Or. Laws 1949, ch. 488, § 11 ..... 1

Or. Rev. Stat. §§ 825.474-825.476 ..... 1

Or. Rev. Stat. § 825.480 ..... 1

Or. Rev. Stat. § 825.482 ..... 1

**Other Authorities**

Hellerstein,
*Is "Internal Consistency" Foolish? Reflections on an Emerging Commerce Clause Restraint on State Taxation*,
87 Mich. L. Rev. 138 (1988) ..... 14

## STATEMENT OF THE CASE

In 1947, Oregon adopted a generally applicable weight-mile tax for heavy vehicles using the State's roads. Or. Laws 1947, ch. 467, § 17. That tax remains in place today. Or. Rev. Stat. §§ 825.474–825.476.

For almost as long, since 1949, Oregon also has allowed carriers of certain commodities—carriers that typically drive a significant number of off-road miles, for whom reporting under the weight-mile tax would be particularly burdensome—to pay a flat fee, in lieu of the weight-mile tax. *See* Or. Laws 1949, ch. 488, § 11. Flat-fee options are available to carriers of logs, sand and gravel, and wood chips. Or. Rev. Stat. § 825.480. The flat fees are available universally to carriers of those commodities.

The Oregon Legislative Assembly has required that the relative weight-mile and flat-fee rates be reviewed biennially and that appropriate adjustments be recommended to each regular biennial session of the Legislative Assembly. Or. Rev. Stat. § 825.482. From time-to-time, the Legislative Assembly has adjusted the relative weight-mile and flat-fee rates based on those biennial reviews.[2]

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[2] For example, the review prepared for the 1989 Legislative Assembly showed that log carriers who elected the flat fee paid $1,435,000 more than they would have paid under the weight-mile tax during that period. By 1993, incremental rate adjustments had reduced the overpayment to $566,532. Similarly, when the 1999 review found an underpayment by log carriers, the legislature adjusted the relative rates to close

In 2000, petitioners brought this action in state court, alleging (among other things) that the flat-fee options discriminate against interstate commerce. In the trial court, petitioners contended first that the flat-fee options are intentionally discriminatory. They argued that the Oregon Legislative Assembly used the flat-fee options to deliberately provide tax savings for certain taxpayers. The court found that to be petitioners' "weakest argument[,]" Pet. Cert. 63a (Trial Court opinion), and they abandoned it at the first stage of appeal. Thus, it is conclusively resolved in this case that the flat-fee options are not intended to provide tax savings for any taxpayers or groups of taxpayers.[3]

Petitioners also argued that the flat fees discriminate by pressuring businesses to concentrate their activities in Oregon to take advantage of the flat fees. But the trial court found "completely lacking" any "evidence that * * * interstate commerce has been damaged[.]" Pet.

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that gap. That adjustment was enacted in 1999—before the complaint in this case was filed—and took effect during 2000, the tax year at issue. Over time, carriers of each flat-fee-eligible commodity have marginally overpaid and marginally underpaid in given years, compared to what they would have paid under the weight-mile tax. *See* SER 19. ("SER" refers to the supplemental excerpt of record in the Oregon appellate courts.)

[3] While the Oregon Legislature's innocent intent is conclusively resolved by the proceedings below, petitioners nevertheless gratuitously insinuate that the tax rates are only "ostensibly" set to avoid tax savings by flat-fee taxpayers. Pet. Cert. 3. Petitioners' insinuations should be disregarded.

Cert. 69a. For example, "[t]here was no evidence of a single out-of-state carrier establishing a fleet or subsidiary to take advantage of flat fee rates[,]" or "of a single in-state carrier refusing to take a load out-of-state in order to concentrate its miles in Oregon." Pet. Cert. 70a. Ultimately, the trial court found it "unlikely that the flat fee option changes the business decisions of truckers." Pet. Cert. 58a.

The trial court also found that, during the year in question, of the three categories of flat-fee taxpayers, two underpaid and one overpaid, compared to what those groups of taxpayers would have paid under the weight-mile tax. Pet. Cert. 49a–53a. In each case, the discrepancy from revenue-neutrality was marginal, not more than about 15 percent. Pet. Cert. 75a.[4] Because the burden, if any, on interstate commerce was both small and uncertain, the trial court held it was incidental at most, and that it was warranted by the legitimate state interests the flat-fee options advance. Pet. Cert. 71a. Accordingly, the trial court sustained the flat-fee options.

Despite the trial court's findings, the Oregon Court of Appeals reversed. It held, as a matter of law, that the flat-fee options violate the internal-consistency principle. The Court of Appeals hypothesized a carrier that operated a

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[4] Petitioners purport to convert that discrepancy into a per-mile rate, which they then purport to compare with the average profit margin in the industry. Assuming that industry profit margins are a relevant yardstick by which to assess the constitutionality of state tax policy, petitioners fail to present the relevant comparison with profit margins in the low-mileage, flat-fee-eligible market segments.

specific number of miles during the tax year. Accepting that hypothesized premise, if Oregon's tax structure were universalized, the carrier's overall tax liability would be greater operating interstate than if it operated in one state only. Because the court was able to hypothesize such a carrier, it held the flat-fee options structurally invalid. *American Trucking Ass'ns, Inc. v. State of Oregon*, 90 P.3d 15, 22–23, 193 Or. App. 185 (2004). Indeed, on that theory, the Court of Appeals struck down even the flat-fee option under which flat-fee taxpayers *overpaid* during the year at issue. *Id.* at 25.

The Oregon Supreme Court rejected the Court of Appeals' injection of hypothetical facts into the analysis of internal consistency. The Oregon Supreme Court held that the challenged tax does not violate the internal-consistency principle because, structurally, it does not expose interstate commerce to multiple taxation. *American Trucking Ass'ns, Inc. v. State of Oregon*, 124 P.3d 1210, 1218, 339 Or. 554 (2005) ("*ATA v. Oregon*"). The court held further that petitioners failed to prove the challenged tax discriminates against interstate commerce. *Id.* at 1219–20. The Oregon Supreme Court therefore reversed the Court of Appeals decision and affirmed the decision of the trial court. *Id.* at 1220–21.

## REASONS FOR DENYING REVIEW

Petitioners contend that this Court should grant review to consider three separate theories on which the challenged flat-fee options purportedly are invalid. Two of those theories assert that the structure of the tax—regardless of evidence—is unconstitutional. Those theories claim, first, that Oregon has run afoul of a general

rule against flat taxes on interstate commerce, and second, that the optional flat fees violate the internal-consistency requirement. Petitioners' third theory is that the record evidence establishes the alleged discriminatory effects of the flat fees. This brief addresses those issues as petitioners present them, taking up the internal consistency argument last.

## I. No case of this Court or of any other court supports petitioners' claim of "structural discrimination" based solely on the "flat" character of the challenged fees, or their corollary claim that in these circumstances they should have been relieved of the requirement to prove discrimination.

Petitioners are unable to cite any decision of this Court, of any federal court of appeals, or of any state supreme court, holding that an optional flat fee, available in lieu of an apportioned tax to interstate and intrastate commerce alike, is "structurally discriminatory." The Oregon Supreme Court's rejection of that argument is in conflict with no case.

Petitioners nevertheless contend that *American Trucking Assn's, Inc. v. Scheiner*, 483 U.S. 266 (1987) and other cases of this Court compel the conclusion that the flat fees challenged in this case are structurally discriminatory. Therefore, they maintain, the Oregon Supreme Court erred by failing *conclusively to presume*—and instead *requiring proof* of—the alleged discriminatory effects of the tax.

In support of that proposition, petitioners rely on *Scheiner*'s statement that "imposition of [a] flat tax[] for a privilege that is several times more valuable to a local

business than its out-of-state competitors is unquestionably discriminatory[.]" Pet Cert. 12 (quoting *Scheiner*, 483 U.S. at 296). *Scheiner*, in turn, quoted that passage from *Nippert v. City of Richmond*, 327 U.S. 416, 426 (1946).

But petitioners' causal theory of discrimination in this case is far more attenuated than in *Scheiner* or *Nippert*. As the quoted passage indicates, those cases involved challenges to flat taxes that were *imposed on* interstate commerce. Here, the challenged tax is not imposed on interstate commerce. Rather, petitioners allege discrimination resulting from an *optional* tax that they were not required to pay, and that they in fact did not pay.

Thus, insofar as the above precedents would support a rule that flat taxes *imposed on* interstate commerce constitute "structural discrimination"—and insofar as the rule would relieve a plaintiff of the burden to prove discriminatory effects in such cases—this case is not within that rule. Nothing in this Court's precedents required the Oregon Supreme Court to relieve petitioners of the burden to prove the alleged discriminatory effects from a flat fee paid optionally by others.

Petitioners also cite numerous state court and circuit court decisions that purportedly demonstrate a split of authority with the Oregon Supreme Court decision below. But each of those cases similarly involves a flat tax *imposed on* interstate commerce. This case is distinguishable on that ground. Just as the Oregon Supreme Court's decision does not conflict with this Court's precedents striking down flat taxes *imposed on* interstate commerce, so too the Oregon Supreme Court's decision

does not conflict with the other state and federal court decisions cited by petitioners.

Indeed, even the decision in *Scheiner*—where the flat tax *was* imposed on interstate commerce—did not rely solely on the "structure" of the tax. Rather, this Court explained, "Although out-of-state and in-state vehicles subject to the axle tax traveled approximately the same number of miles on Pennsylvania's highways, less than one-sixth of the State's total axle tax revenues were generated by Pennsylvania-based vehicles." *Scheiner*, 483 U.S. at 277. On that basis, this Court found discrimination: "[S]ince they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory." *Id.* at 286. Thus, it was *because of* that 500 percent disparity that the taxes were "plainly discriminatory."

And if *Scheiner* itself had not been clear that actual evidence was crucial to the decision, this Court's recent opinion in *American Trucking Assns., Inc. v. Michigan Pub. Serv. Comm'n*, 545 U.S. 429, 125 S. Ct. 2419 (2005) ("*ATA v. Michigan*"), resolves the question. There, this Court summarized *Scheiner*, explaining in particular the record evidence of the 500 percent tax disparity between local and interstate carriers. *Id.* at 2425. After noting the lack of similar evidence that the Michigan tax had discriminatory effects, this Court concluded, "Consequently, we lack any reason to infer that Michigan's lump-sum levy erects, as in *Scheiner*, an impermissible discriminatory road block." *Id.*

No decision of this Court, properly understood, mandates that petitioners should have been entitled to prevail on their claim of discriminatory effects without the need to provide evidentiary support for those alleged effects. Similarly, none of the state court and circuit court decisions cited by petitioners is in conflict with the Oregon Supreme Court's decision in this case.

In short, no case has held that a taxpayer is entitled to a conclusive presumption of discriminatory effects suffered as a result of an optional tax, particularly one paid only by others. Instead, where, as here, an attenuated chain of causation is relied upon in support of alleged discrimination, courts have required evidence, as this Court did in *ATA v. Michigan*.[5] There is nothing untoward in the Oregon Supreme Court's holding to that effect.

## II. The Oregon Supreme Court's consideration of the evidence was sound and unremarkable.

Petitioners ask this court to grant *certiorari* to review the Oregon Supreme Court's factual determinations. Those determinations—findings of a failure of proof by petitioners—were proper in the circumstances, and in any event would not merit United States Supreme Court review.

Analysis of the evidence will be facilitated by a brief discussion of the broader legal context. This Court's

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[5] Insofar as petitioners suggest a concern that lower courts may give *ATA v. Michigan* an overly broad reading, this Court should allow that decision to percolate in the lower courts before revisiting its ruling.

dormant Commerce Clause tax cases inquire first whether the challenged tax is discriminatory, or whether the tax instead imposes only incidental effects on interstate commerce. *See, e.g., Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996). If the tax is discriminatory, then it is subject to strict scrutiny. *Associated Indus. of Missouri v. Lohman*, 511 U.S. 641, 647 (1995).

Discrimination exists when a tax constitutes "economic protectionism" based on "either discriminatory purpose or discriminatory effects." *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Discriminatory purpose can be found most readily based on facial discrimination. *See, e.g., Camps Newfound/Owatonna, Inc. v. Harrison*, 520 U.S. 564 (1997) (striking down property tax exemption expressly available only to charitable institutions principally serving state residents). A court may also find discriminatory purpose based on evidence of actual protectionist legislative intent, as was the case in *Bacchus*.

Finally, as stated in *Bacchus*, discrimination may be found based on evidence of such a disparate effect on interstate commerce that the burden cannot be viewed as incidental. Thus, in *Scheiner*, this Court was unwilling to conclude that the 500 percent discrepancy between the effective tax rate for in-state and out-of-state truckers was incidental. Instead, this Court inferred discrimination, and applied strict scrutiny.

Undisputedly, this case presents no issue of facial or intentional discrimination. Petitioners also do not argue that the flat fees are unconstitutional, if any alleged burden on commerce is deemed incidental. Petitioners do

contend, however, that the Oregon Supreme Court was obliged, on this record, to find that the challenged tax has such a disparate effect on interstate commerce that discrimination must be inferred. The Oregon Supreme Court's rejection of that contention stands on firm ground.

As discussed above, the trial court in this case found no evidence of businesses concentrating operations in Oregon to "take advantage" of the flat-fee options. Pet. Cert. 56a–57a. To the contrary, given "the small size" of any tax advantage, and "the uncertainty of actually achieving a tax benefit," the trial court found it "unlikely that the flat-fee option changes business decisions of truckers." Pet. Cert. 58a. The trial court concluded, "[E]vidence that would indicate that interstate commerce has been damaged was completely lacking." Pet. Cert. 69a. Those findings, affirmed by the Oregon Supreme Court, undeniably are supported by the record.

Moreover, with respect to the alleged tax advantage accorded flat-fee taxpayers, petitioners' argument and evidence suffer from several critical flaws. Petitioners would analogize this case to *Scheiner*, where this Court struck down a tax that did not in any way attempt to approximate a fair charge for the services provided, and which in fact charged out-of-state carriers an effective rate 500 percent greater than their in-state counterparts.

But in this case, the challenged tax *does* attempt to approximate a fair charge. The flat-fee rates are set at a level designed to assess from each category of flat-fee taxpayers the same tax that the group would have paid if it had paid the apportioned weight-mile tax. *ATA v. Ore-*

*gon*, 124 P.3d at 1213. Moreover, as discussed above, the flat fees are carefully monitored to ensure revenue-neutrality within a relatively narrow tolerance and, in the worst cases, the Legislative Assembly misses the mark by about 15 percent.[6]

The constitution does not require precision of state taxes. *See, e.g., Amerada Hess Corp. v. N.J. Taxation Div.*, 490 U.S. 66, 74–75 (1989). The marginal discrepancy in this case from perfectly equal taxation is within a magnitude that has been approved in this Court's dormant Commerce Clause jurisprudence. *See, e.g., Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 184 (1983) (refusing to strike down tax under "external consistency" analysis based on 14 percent dis-

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[6] The trial court found that petitioners seek to "exaggerate the difference" in effective tax rates, and that they "fail to mention" that flat-fee taxpayers sometimes pay more than they would under the weight-mile tax. Pet. Cert. 68a. To support their "exaggerated" view of the difference, petitioners continue to cite their own trial exhibit 82. *See* Pet. Cert. 5 (citing the exhibit as "E.R. 25," which references the excerpt of record in the Oregon appellate courts). But that exhibit, as well as virtually all of petitioners' other evidence of relative tax rates, was admitted through the testimony of their lead witness, Robert Russell. See Trial Transcript at 199-200. In a finding that was not challenged on appeal, the trial court "disregard[ed] Mr. Russell's testimony in its entirety," because he demonstrated "at best, * * * a reckless disregard for the accuracy of the information he presented to the court, and, at worst, he deliberately attempted to deceive the court." Pet. Cert. 50a-60a. Thus, petitioners' continued reliance on evidence admitted through Mr. Russell is misplaced.

crepancy). Properly viewed, the evidence in this case does not support petitioners' claim of discrimination. The Oregon Supreme Court correctly so held and, in any event, that court's assessment of the record evidence in this case is not of sufficient moment to warrant this Court's attention.

Moreover, petitioners improperly rely on cases noting that any degree of discrimination is intolerable. Of course, once "discrimination" is found—for example, where a tax is facially discriminatory—there is no "*de minimus*" defense. But that does not mean, as petitioners suggest, that every disparate effect leads ineluctably to a conclusion of discrimination. If that were so, it would vitiate the entire body of law dealing with incidental burdens on commence. The Oregon Supreme Court's unremarkable rejection of that argument also does not warrant review.

**III. The challenged tax raises no issues of "internal consistency."**

Finally, petitioners ask this court to grant review to consider whether the challenged tax violates the internal-consistency principle. But the version of internal consistency that petitioners advance is supported by no case of this Court, of any circuit court, or of the highest court of any State.

Petitioners again principally rely on *Scheiner*. But in *Scheiner*, this Court explained that the generally applicable flat tax in that case operated as an entry fee for carriers wishing to do business in the State. *See Scheiner*, 483 U.S. at 294 (if each state charged a flat tax for the privilege to make "commercial entrances" into the state,

commerce among the states would be deterred). That flat tax failed the internal-consistency test, because if every state adopted an identical entry fee, then an interstate carrier inevitably would have to pay more than one fee, while an intrastate carrier would have to pay only one. The tax *inherently* subjected interstate truckers to multiple taxation.

The optional flat fees in this case suffer from no such infirmity. They do not operate as entry fees. An interstate carrier may elect instead to pay the perfectly apportioned weight-mile tax. Thus, *Scheiner* readily is distinguishable and is not inconsistent with the Oregon Supreme Court's decision.

Essentially, petitioners' version of internal consistency would establish a hair-trigger nondiscrimination requirement. Under petitioners' view, a tax would fail internal consistency if any circumstance could be hypothesized in which interstate commerce would bear a heavier burden under the tax on account of its interstate character.

But this Court's precedents are clear that a tax does not violate internal consistency merely because it may burden interstate commerce more heavily in specific hypothetical circumstances. Rather, internal consistency is concerned with taxes that *inherently* burden interstate commerce more heavily. Internal consistency is a theoretical exercise, in which one considers the text ("the face") of the challenged statute, subjecting it hypothetically to universal adoption. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989). Internal consistency looks "to the structure of the tax" and "asks nothing about the degree

of economic reality reflected by the tax." *Oklahoma Tax Comm. v. Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995).

As Professor Hellerstein has explained, the internal-consistency test identifies taxes that "will inevitably subject a multistate enterprise to multiple taxation." Hellerstein, *Is "Internal Consistency" Foolish? Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 Mich. L. Rev. 138, 140 (1988). The test exposes "intrinsically unfair" state taxes. *Id.* at 141.

Thus, the internal-consistency test does not ask how the tax would affect tax liabilities under specific hypothesized facts. Indeed, it would be a strange legal doctrine that precluded reliance on specific evidentiary facts in favor of specific hypothetical ones. No case of this Court, of any circuit court, or of any state supreme court, conflicts with the Oregon Supreme Court's rejection of petitioners' proposed form of internal-consistency analysis.[7]

Furthermore, petitioner American Trucking Associations (ATA) recently endorsed a form of tax similar to Oregon's flat-fee options in its *ATA v. Michigan* briefing.

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[7] Petitioners' contention also is belied by this Court's external consistency jurisprudence. Those cases frequently address claims by interstate business entities that, in the specific circumstances, a state tax unfairly burdens them. As *Container Corp.*, discussed above, demonstrates, those cases do not consider every disparate burden fatal to the challenged tax. The analysis instead tolerates an acceptable "margin of error." *Container Corp.*, 463 U.S. at 184.

In that case, Michigan explained the broad array of routine flat fees that might be vulnerable on ATA's view of the applicable standards. ATA sought to defuse that argument, explaining that States still could assess flat fees in appropriately measured ways:

> Nothing would prevent a state from imposing a flat fee on taxpayers who confine their activities to the taxing jurisdiction; the state simply would have to provide a constitutional "out" for those taxpayers who operate in multiple states. For example, *such an out could take the form of apportionment of the tax*.

*ATA v. Michigan*, Petitioners' Reply Brief on the Merits at 13–14 (emphasis added).

Oregon's flat-fee options are an improvement even on the "out" suggested by ATA. Oregon's flat fees are available universally to anyone who would elect them, not restricted to those who confine their activities to Oregon. Just as ATA's hypothetical tax admittedly would not offend the internal-consistency requirement, so too Oregon's flat-fee options readily pass muster under that test, properly understood. Petitioners' contrary argument is not worthy of this Court's review.

**IV. The challenged tax appears to be unique.**

Petitioners contend that a decision in this case could settle the validity of numerous "flat" state assessments on interstate commerce. But again, the flat fees in this case are not *imposed on* interstate commerce. Petitioners cite no other state tax that is similar to the long-standing flat-

fee options at issue here. Because Oregon's flat-fee options are seemingly unique—having evolved as a practical solution to legitimate local concerns—a decision in this case likely would be limited to the facts before the Court.

## CONCLUSION

The Oregon Supreme Court fairly evaluated the contentions and the evidence in this case. Its decision is in line with this Court's dormant Commerce Clause jurisprudence, and with the decisions of other state courts and of the federal circuit courts. Moreover, as the trial court opinion observes, the decision in this case resolves only the constitutionality of the tax as implemented in the tax year at issue. If in the future the Oregon Legislative Assembly fails diligently to maintain revenue-neutrality, there will be time enough for an appropriate challenge. For now, the present petition for *certiorari* should be denied.

Respectfully submitted,

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# In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL*,

*Petitioners*,

v.

STATE OF OREGON, DEPARTMENT OF TRANSPORTATION, *ET AL.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Oregon**

## PETITIONERS' REPLY BRIEF

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## TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... ii

A. The Optional Nature Of The Flat Tax Does Not Vitiate Its Inherently Discriminatory Effect ..... 2

B. The Court Below Applied The Wrong Legal Standard In Concluding That The Undisputed Evidence In This Case Does Not Establish Discrimination ..... 4

C. The Decision Below Misunderstands The Commerce Clause Internal Consistency Requirement ..... 7

D. How To Address Taxes That Structurally Discriminate Against Interstate Commerce Is A Recurring Question That Warrants This Court's Review ..... 9

CONCLUSION ..... 10

## TABLE OF AUTHORITIES

**Page(s)**

### CASES

*American Trucking Associations, Inc.* v. *Michigan Pub. Serv. Comm'n*, 125 S. Ct. 2419 (2005) ..... 3, 9

*American Trucking Associations, Inc.* v. *Scheiner*, 483 U.S. 266 (1987) ..... *passim*

*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564 (1997) ..... 5, 9

*Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996) ..... 9

*Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 349 (1977) ..... 9

*Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175 (1995) ..... 8

*Kraft General Foods, Inc.* v. *Iowa Department of Rev. & Fin.*, 505 U.S. 71 (1992) ..... 9

*Nippert* v. *City of Richmond*, 327 U.S. 416 (1946) ..... 3, 5

*West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994) ..... 9

## PETITIONERS' REPLY BRIEF

The question presented in this case – whether the Commerce Clause invalidates a state tax that is structured so that it necessarily benefits domestic and disadvantages interstate businesses – is a recurring one of great importance. The Court has often recognized that such discriminatory levies have baleful effects on interstate trade and the national economy. Yet there is considerable confusion about how courts should approach taxes that have an inherently discriminatory structure. This Court has famously described its "own decisions in this area as a 'quagmire'" (*American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 266, 280 (1987) (citations omitted)), an observation that is borne out both by the conflicting rulings below in this case and by the conflict between the Oregon Supreme Court's decision and the holdings of other courts that is described in the petition.

There should be no doubt, however, about the constitutionally problematic nature of the Oregon tax regime at issue here. That conclusion is confirmed by the briefs in opposition: they make no attempt to deny the central assertions in the petition about the inherently discriminatory impact of Oregon's flat tax, while offering arguments in defense of the tax that were *not* accepted by the court below. The aberrant nature of the Oregon Supreme Court's ruling also is graphically demonstrated by the undisputed evidence in this case, which shows that the benefits of the flat tax flow almost exclusively to in-state businesses. Because the Oregon Supreme Court's decision upholding this tax misinterpreted the U.S. Constitution, and did so in a manner that conflicts with decisions of this and other courts, further review is warranted.

### A. The Optional Nature Of The Flat Tax Does Not Vitiate Its Inherently Discriminatory Effect

The State defends the flat tax principally by asserting that Oregon's tax regime does not discriminate structurally against interstate commerce – and that empirical proof of discrimination accordingly is necessary if the flat tax is to be challenged – because payment of the flat tax is optional. State Br. in Opp. 5-8; see also AAA Br. in Opp. 6. That argument was not accepted by the court below, which pointedly did *not* rely on the optional nature of the flat tax in rejecting the claim of discrimination and distinguishing *Scheiner*. See Pet. 14. On that, at least, the Oregon Supreme Court was right; the State's distinction is wholly illusory.

The Oregon regime is constitutionally defective because the flat tax provides a discriminatory benefit and corresponding competitive advantage to domestic truckers (or to truckers that concentrate their activities in Oregon), and that benefit is not vitiated in the least by the flat tax's optional nature. There can be no doubt that this is so. As we showed in the petition (at 13-14), trucks that run high mileage in Oregon (which almost invariably are based in Oregon) always will "opt" to pay the flat fee, and therefore will pay Oregon's highway levy at a lower effective rate than trucks that pay the weight-mile tax. That option simply is not available as a practical matter to interstate trucks, because they *never* will run enough miles in Oregon to exceed the break-even mileage.[1] Respondents do not make any response at all to this crucial point. Yet "a state tax that favors in-state business over out-of-state business for no reason other than the

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[1] Interstate trucks would be disadvantaged even if they somehow did exceed the break-even mileage in Oregon because they would have to pay highway taxes to other states in addition to Oregon's flat tax. See Pet. 13-14.

location of its business is prohibited by the Commerce Clause." *Scheiner*, 483 U.S. at 286.[2]

As a fallback, the State argues that *Scheiner* itself requires empirical evidence of a discriminatory effect. State Br. in Opp. 7. We explained in the petition (at 12-13) that this is not a plausible reading of *Scheiner* and is inconsistent with other decisions of this Court, such as *Nippert* v. *City of Richmond*, 327 U.S. 416, 432 (1946), that have not required such evidence when taxes were challenged on the ground that they had a discriminatory structure; the State makes no response. As we also showed in the petition (at 14-17), other state courts of last resort and federal courts of appeals likewise have understood *Scheiner*, as we do, not to require empirical proof of discriminatory effect when a flat tax is challenged. The State does not respond to this point and does not contend that discrimination was proved through empirical evidence in those cases. Finally, the State insists that *American Trucking Associations, Inc.* v. *Michigan Pub. Service Commission*, 125 S. Ct. 2419 (2005), establishes the need for empirical evidence of discrimination when challenging a flat tax. State Br. in Opp. 7-8; see also AAA Br. in Opp. 9-12. We showed in the petition (at 17-19), however, that the *Michigan* decision departed from *Scheiner* because the challenged Michigan tax (unlike the levy invalidated in *Scheiner* and the Oregon flat tax challenged here) fell exclusively on *intrastate* activity. Again, the State makes no response.

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[2] In essence, Oregon is giving high-mileage intrastate carriers the option of paying a lower effective tax rate – an option that is unavailable as a practical matter to interstate carriers. A State could hardly give intrastate companies that do a given volume of business in-state the option of paying their tax at a lower formal rate than applies to companies that perform an equivalent volume of business in other states. But that, essentially, is the nature of the Oregon regime.

### B. The Court Below Applied The Wrong Legal Standard In Concluding That The Undisputed Evidence In This Case Does Not Establish Discrimination

The evidence in this case graphically confirms that the Oregon tax regime provides a competitive benefit to domestic businesses. According to the best available data, only about *one-fifth of one per cent* of out-of-state based carriers opt to pay the flat tax; Oregon-based carriers are fifty times more likely to do so. Out-of-state based carriers make up only 3.5 per cent of those electing to pay the flat tax, pay only two per cent of taxes collected under the flat tax, and operate only two per cent of the total miles reported by trucks paying the flat tax. See Pet. 4-5. Even these data greatly overstate the extent to which out-of-state carriers are able to benefit from the flat-tax option: as we showed in the petition (at 5 n.3), almost sixty per cent of the trucks operated in Oregon by out-of-state carriers that pay the flat tax are base-registered *in Oregon*, and therefore have assumed the characteristics of an Oregon-based business. In addition, beneficiaries of the flat tax achieve substantial tax savings, in an amount that increases the profit margin of the typical taxpayer by approximately fifty per cent. See Pet, 6-7.[3] If em-

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[3] Respondents assert that the flat-tax savings were only fifteen per cent of what would have been collected under the weight-mile tax, an amount they label "marginal." State Br. in Opp. 3; AAA Br. in Opp. 4. But that is an aggregate figure; the more any carrier concentrated its activities in Oregon, the greater that carrier's tax saving. Even on an aggregate basis, as we note in text, the courts below found, and it accordingly must be accepted here, that the flat tax saving per mile amounts to approximately *fifty per cent* of the profit margin of the average carrier. See Pet. App. 26a. This is a significant effect by any measure. Similarly, respondent AAA asserts (at Br. in Opp. 5, 8) that out-of-state sand and gravel carriers received a disproportionate share of the flat-tax savings. But this

pirical proof of discrimination is needed, this record surely provides it. Because the briefs in opposition offer a welter of confusing data and discuss evidence that was found unreliable by the trial court (see, *e.g.*, State Br. in Opp. 11; AAA Br. in Opp. 4), it bears emphasis that the evidence cited in the petition and this brief is derived from stipulations and *respondents*' experts, and accordingly is undisputed.

In arguing that this compelling evidence does not establish discrimination, the State complains that the record fails to show that any interstate carriers changed their business practices in reaction to the flat tax. State Br. in Opp. 2-3, 10; see also AAA Br. in Opp. 5, 12-13. But this Court has never insisted on proof that an unconstitutionally discriminatory tax succeeded in altering market behavior; there was no such evidence in *Scheiner*, *Nippert*, or any other case in which the Court invalidated a discriminatory tax under the Commerce Clause. So long as the tax provides a competitive benefit to local business, "[a] particularized showing of the sort respondent[s] seek[] is not required" (*Camps Newfound/Owatonna, Inc.* v. *Town of Harrison*, 520 U.S. 564, 581 n.15 (1997)), and that is so even if the affected entities "are not deterred from doing a principally interstate business." *Id.* at 578. That must be the rule; Oregon's proposed approach would allow states to provide competitive benefits

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argument, which is not made by the State, is grossly misleading. In total, out-of-state carriers of *all* flat-tax commodities paid only $187,000 out of the $9,266,743 collected under the flat tax, and therefore could have obtained only a tiny fraction of the tax savings. Moreover, a sand and gravel carrier could have obtained any benefit only by concentrating its activities in Oregon, thus yielding to the "hydraulic pressure" of the flat tax. And, of course, if a tax has a structurally discriminatory effect, it is not "saved because some out-of-state carriers which accrue high mileage in [the taxing state] pay the * * * tax at a lower per-mile rate than some [in-state]-based carriers." *Scheiner*, 483 U.S. at 286.

to domestic companies at will so long as they do not exclude the competing interstate businesses altogether.

The State also insists that the flat tax "attempt[s] to approximate a fair charge" because it purportedly is calculated by looking to the mileage traveled by the average truck that travels *only* in Oregon. State Br. in Opp. 10-11. In fact, this feature of the tax is especially *problematic*; by basing its break-even mileage on trucks that operate exclusively in Oregon, the system *guarantees* that it never will be worthwhile for interstate trucks to take advantage of the flat tax – while also assuring that the "free mileage" available to high-mileage trucks accrues only to Oregon carriers and that the economic benefits of the flat tax flow only to carriers that concentrate their activities in the State.[4]

In pointing to the record evidence, we of course do not urge the Court to review the Oregon Supreme Court's factual findings, as the State characterizes our position. See State Br. in Opp. 8, 12; see also AAA Br. 12. To the contrary, assuming that a showing of discriminatory impact is needed here at all, the question – starkly presented in this case – is the *legal* significance under the Commerce Clause of undisputed evidence showing that (1) as a practical matter, a beneficial tax option is available only to in-state businesses and (2) the challenged tax regime provides a lower effective tax rate (and the associated competitive benefits) to those domestic businesses. In ruling this showing inadequate to invalidate the challenged tax, the Oregon Supreme Court adopted an approach that will make it virtually impossible for interstate

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[4] The State suggests that it has periodically adjusted the relative flat-fee and weight-mile rates to make them more equivalent. State Br. in Opp. 1-2 n.1; see also AAA Br. 5-6. In fact, the State's studies consistently showed through the 1990s that payment of the flat fee produced tax savings (see Pl. Ex. 82), and that disparity persisted through the tax year at issue in this litigation.

businesses to establish invalidity of state taxes that have a clearly discriminatory effect.[5] This Court should not allow such a holding to stand.

### C. The Decision Below Misunderstands The Commerce Clause Internal Consistency Requirement

The State also misunderstands the import of the Commerce Clause internal consistency test. The State reads *Scheiner* as finding an internal consistency violation because the flat tax there at issue "subjected interstate truckers to multiple taxation" (State Br. in Opp. 13), and asserts that the internal consistency principle comes into play only when the challenged tax (if replicated elsewhere) will subject multistate enterprises to "'multiple taxation.'" *Id.* at 14 (citation omitted). See also AAA Br. 14-15. This assertion is wrong. There is not, and could not have been, any reference to or reliance on multiple taxation in *Scheiner*.[6] And while the internal consistency test doubtless is useful in identifying state

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[5] When rejecting the probative value of this evidence, the Oregon Supreme Court complained that, in showing "the aggregate savings realized under the flat fee," petitioner failed "to break down those figures between in-state and out-of-state trucking operations." Pet. App. 21a. But where out-of-state carriers make up only 3.5 per cent of those paying the flat tax and pay only two per cent of the taxes collected under the flat tax, a comparison between carriers that pay the flat fee and those that do not serves as an almost perfect proxy for a comparison between in- and out-of-state carriers. The state court's contrary conclusion requires a level of precision that simply is not feasible in the real world and will make Commerce Clause challenges impossible to assert.

[6] As we note in the petition (at 18 n.8), the State in *Scheiner* imposed a flat tax for use of its own highways; no other state could have imposed a duplicative tax on the same value. The problem in *Scheiner* was one of structural discrimination, not duplicative taxation.

taxes that are malapportioned, the Court carefully has not phrased the internal consistency principle in terms that are limited to instances of multiple taxation. Instead, the "test * * * simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Oklahoma Tax Commission* v. *Jefferson Lines*, 514 U.S. 175, 185 (1995).

The Oregon tax regime unquestionably has that sort of discriminatory impact. As we showed in the petition (at 23), if all states adopted an identical system, high-mileage carriers that operate exclusively intrastate would obtain unlimited free miles; otherwise identical interstate carriers that travel the same number of miles but do so across state lines either would not reach the break-even point in any one state (and therefore would receive no free miles) or would have to pay flat taxes in many states. Neither the State nor the Oregon Supreme Court denies that this is so. In holding this lack of internal consistency to be immaterial, the decision below accordingly departs from the rule stated by this Court, conflicts with the rulings of other state courts of last resort and federal courts of appeals (see Pet. 26-27), and places interstate businesses at an insuperable disadvantage.[7]

The State also is incorrect in asserting that application of the internal consistency test as it has been articulated by the Court would "establish a hair-trigger nondiscrimination requirement" (State Br. in Opp. 13) or mean that "every disparate effect leads ineluctably to a conclusion of

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[7] The State's assertion that "the internal-consistency test does not ask how the tax would affect tax liabilities under specific hypothesized facts" (State Br. in Opp. 14) is puzzling. As the State itself recognizes, "[]internal consistency is a theoretical exercise." *Id.* at 13. Thus, "[t]his test asks nothing about the degree of economic reality reflected by the tax." *Jefferson Lines*, 514 U.S. at 185.

discrimination." *Id.* at 12. The Oregon tax is constitutionally defective not because it *happens* to fall more heavily on interstate businesses, but because it is structured in such a way that it *necessarily and inevitably* provides a competitive advantage to domestic businesses.[8]

### D. How To Address Taxes That Structurally Discriminate Against Interstate Commerce Is A Recurring Question That Warrants This Court's Review

Finally, the State is wrong in contending that review is unnecessary because the Oregon tax is "unique." State Br. in Opp. 15-16. Most of this Court's Commerce Clause cases involved challenges to state taxes that had features every bit as idiosyncratic as those of the Oregon tax regime. See, *e.g.*, *Camps Newfound/Owatonna*; *Fulton Corp.* v. *Faulkner*, 516 U.S. 325 (1996); *West Lynn Creamery, Inc.* v. *Healy*, 512 U.S. 186 (1994); *Kraft General Foods, Inc.* v. *Iowa Department of Rev. & Fin.*, 505 U.S. 71 (1992); *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U.S. 349 (1977). At the most fundamental level, this case involves an issue that recurs frequently in many guises: how to apply the understanding that "'[t]he Commerce Clause forbids discrimination, whether forthright or ingenious.'" *West Lynn Creamery*, 512 U.S. at 201 (citation omitted).

The reality of this case is straightforward. Oregon makes use of a tax regime whose structure necessarily discriminates in favor of in-state businesses. The evidence confirms powerfully that the benefits of the flat tax in fact flow almost exclu-

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[8] The brief filed by petitioner in the *Michigan* litigation, cited at State Br. in Opp. 14-15, is entirely consistent with this view. Petitioner was there referring to state levies on taxpayers who confine their activities to the taxing state; Oregon's tax is of a very different character.

sively to domestic businesses, and do so in an amount that has competitive significance. But the Oregon Supreme Court nevertheless upheld the tax, finding its structure constitutionally immaterial and the evidence of discrimination nonprobative. Because the proper interpretation of the Commerce Clause is vital to the promotion of a uniform national economy, because further consideration of this case would provide useful guidance in a confusing area of the law where the lower courts are in conflict, and because the state-court decision in this case approved a state tax that runs afoul of fundamental constitutional principles, review of the decision below by this Court is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC., *ET AL.*
*Petitioners,*

v.

STATE OF OREGON, DEPARTMENT OF TRANSPORTATION, *ET AL.*
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of Oregon**

## BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

Whether a flat fee imposed by the State of Oregon upon commercial vehicles conducting interstate operations violates the Commerce Clause of the United States Constitution.

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | *i* |
| TABLE OF AUTHORITIES | iii |
| INTEREST OF *AMICUS CURIAE* | 1 |
| STATEMENT OF THE CASE | 2 |
| REASONS FOR GRANTING THE PETITION | 4 |
| CONCLUSION | 13 |

## TABLE OF AUTHORITIES


| CASES | Pages |
|---|---|
| *American Trucking Ass'ns, Inc. v. Michigan Public Service Comm'n*, 125 S. Ct. 2419 (2005) | *passim* |
| *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987) | *passim* |
| *Baldwin v. Seelig*, 294 U.S. 511 (1935) | 1 |
| STATUTES | |
| Or. Rev. Stat. § 825.486 | 9 |
| OTHER MATERIALS | |
| Pet. | 4, 12 |
| Pet. App. | *passim* |
| Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986) | 6 |

## INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than three million businesses and organizations of every size, operating in every sector of the economy and in every geographic region of the country. One of the Chamber's primary missions is to represent the interests of its members by filing *amicus* briefs in cases involving issues of national concern to American business. The Chamber has participated as *amicus curiae* in several hundred cases before this Court.

The Chamber and its members have a strong interest in this case because the decision of the Oregon Supreme Court is inconsistent with the core constitutional principle of free trade among the states. The federal Constitution was drafted to replace the Articles of Confederation largely to advance that principle, and it is critical to the conduct of American business that the United States remain a free trade zone. As this Court has emphasized, the Commerce Clause "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. Seelig*, 294 U.S. 511, 523 (1935).

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[1] Counsel for the parties have consented to the filing of this brief, and their consents have been filed with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

## STATEMENT OF THE CASE

Most heavy trucks using Oregon's highways pay a "weight-mile tax" based on the weight of the truck and the number of miles it travels in Oregon. This common form of highway tax does not discriminate against interstate commerce because interstate truckers that use Oregon's highways less than local truckers pay a proportionately smaller tax. A flat tax on truckers, in contrast, would impose the same fee on both interstate and strictly intrastate operators. Flat taxes violate this Court's requirement of "internal consistency" because if multiple states were to adopt such taxes, interstate truckers would pay much more in taxes per mile driven than trucks operating in a single state. *See American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 296 (1987) (holding that Pennsylvania's flat tax on truckers violated the Commerce Clause).

The present case arises from Oregon's provision that carriers hauling logs, sand and gravel, and woods chips may elect to pay a flat tax instead of a weight-mile tax. Although carriers must select the option annually and apply it to their entire fleet, carriers providing primarily in-state services will generally benefit because their flat tax payments will often be less than their weight-mile payments would be. Indeed, the evidence below showed that the flat tax option confers a substantial competitive advantage: sand and gravel carriers electing the flat tax option save on average 1.34 cents per mile and log carriers save on average 1.9 cents per mile compared to competitors paying weight-mile taxes. Pet. App. 26a. Because the average profit margin for truckers is about 3 cents per mile, those tax savings are significant. *See id.*

Not surprisingly, the evidence also showed that Oregon-based carriers were far more likely to take advantage of the tax savings provided by the flat tax option. Less than one-quarter of one percent of carriers based out of state that used Oregon's highways paid the flat tax. Pet. 4. Carriers based in Oregon, in contrast, were fifty times more likely to elect the flat tax option. *See id.*

The Oregon Court of Appeals, relying primarily on *Scheiner*, concluded that the structure of the flat tax and the evidence described above rendered it invalid. The court wrote that Oregon's approach "discriminate[s] between interstate and intrastate carriers whose businesses differ only because of their relationship to state boundaries, and the discrimination operates to the detriment of the interstate carrier." Pet. App. 34a. According to the court, Oregon's flat tax plainly fails the internal consistency test and therefore exerts pressure on interstate carriers to change their operations to focus on intrastate business. *See id.* at 33a-34a.

The Oregon Supreme Court reversed, relying in part on this Court's decision in *American Trucking Ass'ns, Inc. v. Michigan Public Service Comm'n*, 125 S. Ct. 2419 (2005). In the Michigan case, this Court upheld a $100 annual fee on truckers transporting goods within Michigan. Although that fee appears similar to a flat tax, interstate carriers operating in Michigan could avoid the $100 fee and obtain a permit for $10 authorizing them to carry intrastate loads for 72 hours, and no evidence showed that interstate truckers seeking to "top off" their loads suffered in light of that option. *Id.* at 2424. In addition, although the Court recognized that an interstate trucker might have to pay multiple fees if other states adopted Michigan's approach, it emphasized that the

carrier would have to do so only because it engaged in purely "*local* business" in those states. *See id.* at 2425.

## REASONS FOR GRANTING THE PETITION

After this Court's decision in *Scheiner*, many states acknowledged that their flat highway taxes were unconstitutional. The decision below, however, has provided a roadmap for state legislatures and courts to circumvent the Constitution by merely recasting protectionist measures as "locally focused flat fees." Pet. App. at 21a-22a. The unfortunate consequence, if the decision below stands, is likely to be a new round of protectionist flat tax legislation. To avoid this result and its attendant effects on interstate commerce, this Court should grant certiorari to review the Oregon decision.

Significantly, under the lower court's approach, Pennsylvania could effectively re-enact the flat tax struck down in *Scheiner* by presenting it—like the tax at issue here—as an elective alternative to a weight-mileage tax affecting primarily intrastate commerce. It would be a simple matter to design the flat tax as an "option" that few interstate carriers could take advantage of while, as in Oregon, many intrastate operators would obtain a tax benefit. As this Court explained in *Scheiner*, however, that result would undermine the purpose of the Commerce Clause by providing an incentive to offer local rather than interstate service.

The court below purported to follow this Court's decision *Michigan Public Service Comm'n*. But nothing in *Michigan Public Service Comm'n* changed this Court's approach to the kinds of taxes at issue in *Scheiner*. To the contrary, as further set forth below, that case is readily distinguishable because the challenged tax applied only to *intrastate* commerce,

because carriers could avoid the fee by obtaining a $10 permit good for 72 hours, and because the tax was intended to defray administrative costs likely to vary per truck or per carrier rather than per mile traveled. *See* 125 S. Ct. at 2423-2425.

In short, the lower court's misunderstanding of *Scheiner* and of the line between *Scheiner* and *Michigan Public Service Comm'n* threatens to undermine this Court's Commerce Clause jurisprudence and encourages other states to enact and uphold similarly discriminatory laws. This Court should grant the petition and clarify that a tax that fails the internal consistency test violates the Commerce Clause unless it applies to entirely local commerce and the evidence provides no reason to think that the tax penalizes interstate commerce.

1. The lower court's treatment of *Scheiner* effectively renders it a dead letter. As noted above, the result is that under the Oregon court's approach states could enact *Scheiner*-style flat taxes simply by casting them as optional, "locally focused" alternatives to weight-mileage taxes. This Court should not wait for other states to follow Oregon's lead, but should act now to reaffirm *Scheiner*.

In *Scheiner*, this Court confronted a pair of taxes imposed by Pennsylvania on trucks using its roads. The first, a "marker fee," was imposed only on out-of-state vehicles. For in-state trucks, the state's registration fee was deemed to include that payment. *See Scheiner*, 483 U.S. at 273-274. The second fee was an "axle tax," a flat tax that varied from $72 to $180 per vehicle depending on the number of axles. *Id.* at 274. Trucks that traveled less than 2,000 miles inside of Pennsylvania were eligible for a proportional rebate on

their axle tax, and truckers could avoid paying the axle tax by paying $25 for a permit valid for five days. *Id.*

The *Scheiner* Court held that both fees violated the Commerce Clause. "[U]napportioned flat taxes . . . penalize some travel within the free trade area" protected by the Commerce Clause. *Id.* at 284. The Court explained that if other states were to pass a similar tax, interstate carriers would clearly suffer a substantial competitive disadvantage compared to exclusively in-state operators. *See id.* The total amount that a carrier would pay would depend not on how many miles the carrier traveled or the cost to the states (in wear and tear and other resources used) of the carrier's activities, but rather simply upon how many states the carrier traveled through. In other words, as the *Scheiner* Court noted, the challenged fees bore "'much more heavily in the aggregate on a firm that sells in many places than on a firm otherwise identical . . . that sells in only one place.'" *Id.* at 287 n.20, quoting Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1188 (1986). The Court concluded that such flat taxes have "a forbidden impact on interstate commerce because [they] exert[] an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Scheiner*, 483 U.S. at 286-287.

Significantly, while the practical effect of flat taxes is that in-state carriers *generally* pay a lower per-mile tax than out-of-state carriers, that need not be categorically true for a flat tax to pose an unconstitutional burden on interstate commerce. In *Scheiner* itself, the Court acknowledged that some out-of-state carriers accruing very high mileage in Pennsylvania paid a lower per-mile tax than some in-state

carriers, but dismissed that fact as unimportant.[2] The constitutional problem with the challenged taxes was their tendency to encourage carriers to accrue miles in a single state where they had paid the flat tax rather than to travel across state lines. *See id.* at 286-287.

Nothing in this Court's decision in *Michigan Public Service Comm'n* overruled, limited, or even hinted at criticism of *Scheiner*. The later case held only that the fee on local commerce at issue there had so little in common with the flat taxes prohibited under *Scheiner* that *Scheiner*'s rule did not reach them.

The Michigan case involved a $100 tax imposed on trucks engaging in strictly intrastate commercial operations—trucks undertaking point-to-point hauls within the State. *See Michigan Public Service Comm'n*, 125 S. Ct. at 2422. As noted above, a carrier could avoid the fee by paying $10 for a permit valid for 72 hours. *See id.* at 2424. In upholding the tax against a Commerce Clause challenge, the Court emphasized that the tax applied *only to intrastate commerce*. *See id.* at 2423-2425. The Court also pointed out that the tax did not fund road maintenance, but rather was designed to defray costs associated with regulating vehicle size and weight, administering insurance requirements, and applying safety standards. Such costs, the Court noted, may be more likely to vary per truck or per carrier than per mile traveled.

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[2] That local interests are the primary beneficiaries of much legislation that runs afoul of the dormant Commerce Clause should not be surprising. Nor should it be surprising when they are not the exclusive beneficiaries, given that a facially discriminatory tax against out-of-state interests stands little chance of being upheld by any court.

*Id.* at 2424. Finally, the Court observed that the costs associated with changing the tax assessment mechanism from a flat fee to a per-mile charge (the preferred option of those challenging the tax) would be so large that "the game [would be] unlikely to be worth the candle." *Id.* Under all of these circumstances, the Court was unwilling to hypothesize that a purely local tax would hinder interstate commerce absent evidence of such an effect.

The court below ignored these critical aspects of *Michigan Public Service Comm'n* in upholding the flat tax at issue here. According to the lower court, the Michigan case stands for the proposition that "locally focused flat fees" should not be presumed to have a discriminatory effect on interstate commerce. Pet. App. at 21a-22a. That is a misreading of *Michigan Public Service Comm'n*. In that case, the "local focus" of the tax upon which the Court relied was the fact that the *entire* transaction being taxed, in *every transaction* being taxed, was an intrastate transaction. Put another way, the tax in *Michigan Public Service Comm'n* did not apply to the in-state portion of *any* interstate commerce, but rather applied only to entirely separate transactions occurring entirely within the boundaries of a single state. The *Michigan* Court put this point straightfowardly: the Michigan fee "taxes purely local activity; it does not tax ... transactions spanning multiple States." *Michigan Public Service Comm'n*, 125 S. Ct. at 2425.

The Oregon Supreme Court's conception of "locally focused" is very different. In the present case, the tax is locally focused only insofar as it "is aimed at operations that take place primarily in Oregon." Pet. App. 18a. In other words, the Oregon tax applies to certain trucks driving on the State's roads, and it so happens that many of those trucks are

engaged in primarily intrastate commerce. But that, of course, is virtually *always* true of taxes that states apply to trucking enterprises—the taxes apply to trucks wishing to use the states' roads, and many truckers on those roads are engaged in intrastate commerce.[3] Plainly, that is not enough to immunize such taxes from constitutional scrutiny under *Scheiner* and this Court's subsequent dormant Commerce Clause cases, including *Michigan Public Service Comm'n*.[4]

The other factors upon which this Court relied in upholding the Michigan tax are also absent from this case. There is no indication, for example, that the Oregon taxes were designed to cover expenses such as vehicle safety regulation that would make a per-vehicle charge reasonable; rather the tax appears to be a use tax. *See* Pet. App. 24a-25a, citing Or. Rev. Stat. § 825.486 (paying the flat tax or the

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[3] Notably, however, the Oregon Supreme Court's own opinion acknowledges that the flat tax here applies to some *inter*state commerce. Pet. App. 1a. The court accorded that fact no significance, however, notwithstanding that this Court held it constitutionally significant in differentiating between the Michigan and the Pennsylvania taxes. *See Michigan Public Service Comm'n*, 125 S. Ct. at 2423; *see also supra* at 7-8.

[4] That the court below has not properly reconciled *Scheiner* and *Michigan Public Service Comm'n* is further evidenced by its assertion that adopting petitioner's view in this case would require the invalidation of all local taxes. *See* Pet. App. 22a. This Court in *Scheiner*, while invalidating a flat tax similar to the one in this case, noted that certain local flat taxes could be proper. *See Scheiner*, 483 U.S. at 296 & n.26. Indeed, *Michigan Public Service Comm'n* itself *upheld* a flat tax while stating that it was applying the rule from *Scheiner*. *See Michigan Public Service Comm'n*, 125 S. Ct. at 2423.

weight-mile tax in Oregon exempts the truck from having to pay any fuel tax, a classic use tax). Likewise, this is not a flat tax as to which replacement with a per-mile tax would create an administrative burden such that the "game would not be worth the candle." On the contrary, the flat tax in Oregon does not reduce any administrative burden appreciably, as all carriers are required to report their Oregon mileage regardless of which tax they elect to pay. *See* Pet. App. 5a.[5] In short, the Oregon tax is not analogous to the sort of flat administrative fee approved in *Michigan Public Service Comm'n*.

The lower court did attempt to distinguish this case from *Scheiner* by asserting that in *Scheiner* there was more evidence of discrimination against interstate commerce in the record. The court chided the plaintiffs for relying on evidence of the aggregate savings realized under the flat fee option, and for "not break[ing] those figures down between in-state and out-of-state trucking operations, or otherwise show[ing] how the aggregate savings serve to set the two groups apart." Pet. App. 21a.

In fact, however, the evidence sufficient to invalidate the tax in *Scheiner* was no more developed than the evidence here. In both cases, the evidence showed that the amounts at

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[5] Admittedly, the flat tax results in some administrative savings. The trial court found that many flat-tax filers took their duties casually and misreported their mileage. *See, for example*, Pet. App. 45a ("[M]ost [flat-tax mileage reports] were clearly inaccurate."). Second, Oregon does not audit flat tax mileage reports. *See* Pet. App. 5a. That the State ignores rampant misreporting that calls into question the reliability of its data about the benefits obtained by flat-tax filers should not help sustain the tax.

issue were significant and that the tendency of the tax was to encourage intrastate rather than interstate commerce. In this case, the former point cannot be disputed—in a business with profit margins of 3 cents per mile, savings of 1.34 to 1.9 cents per mile are significant. *See* Pet. App. 26a. And petitioners here, as in *Scheiner*, showed that "the flat tax "exert[s] pressure on the interstate carrier to change its operations to focus on intrastate business." Pet. App. 33a. *Compare Scheiner*, 483 U.S. at 286 (a flat tax, by its nature, "exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure"). Since the tax in *Scheiner* was not—unlike in the Michigan case—limited to purely *intra*state commerce, that was enough to show that the tax was unconstitutional. The same is true here.

In sum, the decision below points the way for states to enact new flat tax laws on interstate commerce and suggests to courts that such taxes can be upheld notwithstanding their inherently discriminatory nature as long as they are described as "locally focused." Indeed, by following the blueprint laid out in the decision below, Pennsylvania could re-enact the tax invalidated in *Scheiner* with only modest semantic changes.[6] Powerful local interests in other states are likely to seek similar protective legislation. This Court should take the

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[6] Pennsylvania's tax was a flat tax with a per-mile rebate, while the Oregon tax is a per-mile tax with a flat tax option. In order to rewrite the tax, Pennsylvania would simply need to change the axle tax to a per-mile per-axle tax and replace the rebate for carriers traveling under 2000 miles with an "optional flat tax" with a break-even point set at 2000 miles. Revenue from the tax, as well as the administrative costs of the tax, would be identical under the "new" scheme.

opportunity now to clarify that flat taxes, while appropriate in limited circumstances, must not discriminate against interstate commerce.

2. The question presented in the Petition is one of great significance to American business. Legal and regulatory uncertainty present substantial obstacles to prudent business decision-making. The Oregon Supreme Court's decision, which conflicts with the decisions of other federal circuit courts and state courts of last resort to have considered the constitutionality of similar taxes, *see* Pet. 14-17, 26-27, invites local interests to press for similar discriminatory taxes elsewhere. Such legislation imposes a host of costs on businesses that engage in interstate commerce—the direct costs of the discriminatory tax are only the most obvious. The litigation that will inevitably follow, and any adverse decisions that may result, will also be costly to such businesses. And the decision below—by imposing a seemingly insuperable evidentiary burden on plaintiffs—ensures that challenging such legislation will be difficult indeed.

Notably, however, businesses that engage only in intrastrate commerce will avoid these costs as well, further heightening the economic discrimination imposed by the taxes. Likewise, the local interests privileged by the flat tax's discriminatory effect need not concern themselves with the uncertainty created by such a tax. If the courts strike it down, the local interests lose only an artificial competitive advantage over outsiders. The reverse is true for interstate businesses: no state attorney general will challenge these discriminatory tax laws for them, and they must weigh the possibility of an unfavorable decision when considering where to do business.

In short, the decision of the court below tips the playing field unfairly toward in-state companies. This Court can reaffirm existing law and remove this cloud over competition by granting the Petition and reversing the Oregon Supreme Court's decision.

## CONCLUSION

This Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted.

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